

H.R. 885 AND H.R. 1753

LEGISLATIVE HEARING

BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
OF THE
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS
FIRST SESSION

Thursday, October 2, 2003

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C O N T E N T S

Hearing held on Thursday, October 2, 2003	Page 1
Statement of Members:	
Calvert, Hon. Ken, a Representative in Congress from the State of California	1
Prepared statement of	2
Grijalva, Hon. Raul M., a Representative in Congress from the State of Arizona	14
Hayworth, Hon. J.D., a Representative in Congress from the State of Arizona	4
Prepared statement of	5
Kyl, Hon. Jon, a U.S. Senator in Congress from the State of Arizona	6
Prepared statement on H.R. 885	8
Napolitano, Hon. Grace F., a Representative in Congress from the State of California	3
Prepared statement of	3
Nethercutt, Hon. George, Jr., a Representative in Congress from the State of Washington	9
Prepared statement on H.R. 1753	11
Pearce, Hon. Stevan, a Representative in Congress from the State of New Mexico	13
Prepared statement of	13
Renzi, Hon. Rick, a Representative in Congress from the State of Arizona	12
Prepared statement of	12
Statement of Witnesses:	
Guenther, Herbert R., Director, Arizona Department of Water Resources, Oral statement on H.R. 885	68
Response to questions submitted for the record	76
Supplemental statement submitted for the record	124
Hickok, Steven, Deputy Administrator, Bonneville Power Administration	21
Prepared statement on H.R. 1753	23
Response to questions submitted for the record	26
Juan-Saunders, Vivian, Chairwoman, Tohono O'odham Nation	58
Prepared statement on H.R. 885	60
Kitcheyan, Kathleen W., Tribal Chairwoman, San Carlos Apache Tribe, Oral statement on H.R. 885	66
Lopez, Estevan R., Director, New Mexico Interstate Stream Commission ..	78
Prepared statement on H.R. 885	79
Martin, Aurene, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, Oral statement on H.R. 885	21
Napolitano, Hon. Janet, Governor, State of Arizona, Prepared statement of	69
Narcia, Hon. Richard, Governor, Gila River Indian Reservation	51
Prepared statement on H.R. 885	53
Response to questions submitted for the record	57
Pollak, Stanley, Water Rights Counsel, Navajo Nation, Oral statement on H.R. 885	82
Raley, Bennett W., Assistant Secretary for Water and Science, U.S. Department of the Interior	14
Prepared statement on H.R. 885	15
Response to questions submitted for the record	20
Shirley, Joe, Jr., President, Navajo Nation, Prepared statement on H.R. 885	84
Seyler, Warren, Chairman, Spokane Tribe of Indians	33

IV

	Page
Statement of Witnesses—Continued	
Seyler, Warren, Chairman, Spokane Tribe of Indians —Continued	
Prepared statement on H.R. 1753	35
Response to questions submitted for the record	38
Additional materials supplied:	
Arizona Cities of Chandler, Glendale, Goodyear, Mesa, Peoria, and Scottsdale, Statement submitted for the record in support of H.R. 885 .	99
Burdette, Vivian, Chairwoman, Tonto Apache Tribe, Statement submitted for the record in support of H.R. 885	123
Fines, L. Anthony, Attorney for Gila Valley Irrigation District and David A. Brown, Attorney for Franklin Irrigation District, Statement submitted for the record	101
Fullmer, Jamie, Chairman, Yavapai-Apache Nation, Statement submitted for the record in support of H.R. 885	123
Gila River Indian Community, Supplemental testimony submitted for the record	101
Hawker, Hon. Keno, Mayor, City of Mesa, Arizona, Statement submitted for the record	107
Mason, Douglas, General Manager, San Carlos Irrigation and Drainage District, Coolidge, Arizona, Statement submitted for the record in support of H.R. 885	108
Payson, Town of, Arizona, Statement submitted for the record by the Mayor and Common Council in support of H.R. 885	109
Renner, George, President, Board of Directors, Central Arizona Water Conservation District, Statement submitted for the record	109
Rimsza, Hon. Skip, Mayor, City of Phoenix, Arizona, Statement submitted for the record in support of H.R. 885	112
Spokane Tribe of Indians: A Showing of the United States' Need to Fairly and Honorably Settle the Tribes Claims for Grand Coulee—A Narrative with Attachments, submitted for the record on H.R. 1753 .	123
Sullivan, John F., Associate General Manager, Water Group, Salt River Valley Water Users Association and Salt River Project Agricultural Improvement and Power District, Statement submitted for the record in support of H.R. 885	114
Talley, Hon. Van, Mayor, City of Safford, Arizona, Statement submitted for the record in support of H.R. 885	122

LEGISLATIVE HEARING ON H.R. 885, TO PROVIDE FOR ADJUSTMENTS TO THE CENTRAL ARIZONA PROJECT IN ARIZONA, TO AUTHORIZE THE GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT, TO REAUTHORIZE AND AMEND THE SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT OF 1982, AND FOR OTHER PURPOSES; AND H.R. 1753, TO PROVIDE FOR EQUITABLE COMPENSATION OF THE SPOKANE TRIBE OF INDIANS OF THE SPOKANE RESERVATION IN SETTLEMENT OF CLAIMS OF THE TRIBE CONCERNING THE CONTRIBUTION OF THE TRIBE TO THE PRODUCTION OF HYDROPOWER BY THE GRAND COULEE DAM, AND FOR OTHER PURPOSES.

**Thursday, October 2, 2003
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Resources
Washington, DC**

The Subcommittee met, pursuant to notice, at 10:02 a.m., in Room 1324, Longworth House Office Building, Hon. Ken Calvert [Chairman of the Subcommittee] presiding.

Present: Representatives Calvert, Hayworth, Renzi, Pearce, Napolitano and Grijalva.

STATEMENT OF HON. KEN CALVERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CALVERT. The legislative hearing by the Subcommittee on Water and Power will come to order.

The Subcommittee today is meeting to hear testimony on H.R. 885, to provide for adjustments to the Central Arizona Project in Arizona to authorize the Gila River Indian Community water rights settlement, to reauthorize and amend the Southern Arizona Water Rights Settlement Act of 1982, and for other purposes; and

H.R. 1753, to provide for an equitable compensation of the Spokane Tribe of Indians of the Spokane Reservation in the settlement of claims of the tribe concerning the contribution of the tribe to the production of hydropower by the Grand Coulee Dam, and for other purposes.

Mr. CALVERT. Today's hearing is another step in our efforts to examine the potential value of other water and power resources throughout the West. Both bills before the Subcommittee today have direct impacts on Native American communities and their communities, and their neighbors.

The Arizona delegation, particularly Senator Kyl, who will be here shortly, and my distinguished colleague, J.D. Hayworth, have worked hard to find consensus-based water solutions in their State. H.R. 885 and its Senate companion bill reflect those efforts to date. The bills rightly attempt to resolve costly litigation and give the people of Arizona a road map of water certainty through a whole host of water supply and uses. As one who has worked to bring parties together to resolve a similar situation involving the quantification settlement agreement in Southern California with our friends in the Upper and Lower Basin, I strongly support the concepts of long-term water certainty and reducing litigation.

Although I realize that some issues remain on H.R. 885, I want to commend the Arizona delegation and the administration for their leadership in attempting to resolve this very complex situation.

I would also like to commend my Washington State colleague, George Nethercutt, for rising in strong defense of his constituents and trying to bring more accountability to how our government operates. I know that he has worked hard for many years on trying to right the wrongs of the past as it relates to the Spokane Tribe. Everyone agrees that the tribe has been seriously impacted by the construction of the Grand Coulee Dam. However, disagreement exists over the best method to compensate the tribe. I realize the tribe has run into a substantial statute of limitation problem with their claim, but that shouldn't stop the tribe and the Bonneville Power Administration from working constructively on a final solution.

[The prepared statement of Mr. Calvert follows:]

**Statement of The Honorable Ken Calvert, Chairman,
Subcommittee on Water and Power, on H.R. 885 and H.R. 1753**

Today's hearing is another step in our effort to examine the potential value of our water and power resources throughout the west. Both bills before the Subcommittee today have direct impacts on their respective native American communities and on their neighbors.

The Arizona delegation, particularly Sen. Kyl and my distinguished colleague, J.D. Hayworth, have worked hard to bring about consensus-based water solutions for their state. H.R. 885 and its Senate companion bill reflect that progress to date. The bills rightly attempt to resolve costly litigation and give the people of Arizona a roadmap of water certainty through a whole host of water supplies and uses.

As one who has worked to bring parties together to resolve a similar situation involving the March 11, 2004, Quantification Settlement Agreement in southern California, I strongly support these concepts.

Although I realize that some issues remain on H.R. 885, I want to commend the Arizona delegation and the Administration for their leadership in attempting to resolve this very complex situation.

I would also like to commend my Washington State colleague, George Nethercutt, for rising in strong defense of his constituents and trying to bring more

accountability to how our government operates. I know that he has worked hard for many years on trying to right the wrongs of the past as it relates to the Spokane Tribe.

Everyone agrees that the Tribe has been seriously impacted by the construction of the Grand Coulee Dam, however disagreement exists over the best method to compensate the Tribe. I realize that the Tribe has run into a substantial statute of limitations problem with their claim, but that shouldn't stop the Tribe and the Bonneville Power Administration from working constructively on a final solution.

Since I have to leave mid-way through the hearing, I am going to hand the gavel to my able friend and colleague, J.D. Hayworth at the appropriate time. In the meantime, I welcome the witnesses and look forward to resolution on these bills. I also ask that members limit their questions to the Administration to the issues before us today. Thank you

Mr. CALVERT. Since I must leave midway through the hearing, I am going to hand the gavel over to my able friend and colleague, J.D. Hayworth, at the appropriate time. In the meantime, I will welcome the witnesses and ask all parties to find resolutions on these bills.

I also ask that members limit their questions to the issues today before us, and I would thank you.

I now recognize my friend and recognize Ms. Napolitano and the Ranking Democrat member for any statements she may have.

STATEMENT OF HON. GRACE NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chairman. That really was a low blow.

[Laughter.]

Mrs. NAPOLITANO. I am teasing. Thank you for the opportunity to be here today, Mr. Chair. The two water bills before us today affecting Native Americans have had a long and complex history, as we have heard, and upon reading it, I am aghast. I am amazed at how long it has been to have this before us, and I am sure my colleagues are as distressed as I am and hope that this neglect, this shunning of our obligation to our Native Americans will be righted, or at the least the beginning of finding the solutions to helping those people that have suffered for so long without some equality in these areas.

I congratulate my colleagues for their efforts and trust that we will be having some solutions as we move forward. Thank you so very much, Mr. Chair. I look forward to the hearing.

[The prepared statement of Mrs. Napolitano follows:]

Statement of The Honorable Grace Napolitano, a Representative in Congress from the State of California

Thank you, Chairman Calvert, for holding this important hearing today.

H.R. 885 would provide adjustments to the Central Arizona Project, authorize a water rights settlement for the Gila River tribe and amend the Southern Arizona Water Rights Settlement Act.

H.R. 1753 would provide equitable compensation of the Spokane Tribe of Indians of the Spokane Reservation.

Both bills have a long and complex history that dates back prior to my time in Congress. I look forward to hearing from our witnesses, and especially thank those that traveled to Washington to be here today.

Mr. CALVERT. I thank the gentlelady.
Mr. Hayworth?

**STATEMENT OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. HAYWORTH. Mr. Chairman, thank you very much, and I would like to begin by thanking Chairman Pombo and Chairman Calvert for scheduling this, also my good friend and colleague from the First District, Rick Renzi, who is the Vice Chairman and will have a hand in the hearing today, and I see my friend, Mr. Grijalva, so we have good bipartisan representation from the State of Arizona; and we will no doubt be joined by our friend from the new Sixth District, Congressman Flake, who also serves on this Subcommittee.

Let me pause at this juncture, Mr. Chairman, to personally thank the witnesses for traveling so far to be here today to testify. In particular, I know that in addition to the tribal chairpeople who are here to testify, a number of my friends who serve on the tribal councils as well as tribal administrators and many other Arizonans join us today in the audience.

Because of time constraints, we will have only one witness representing the State of Arizona, but I am informed that you have secured formal approval of the settlement agreement from most of the cities, towns, irrigation districts, and water purveyors in Arizona that are incorporated in the current settlement framework.

We are also joined today by our friends from New Mexico. It is my understanding that Arizona and New Mexico interests have been able to reach an agreement that will resolve some of the claims that are currently in dispute between water users in our two States. I am hopeful this successful effort will soon translate into a successful resolution on another Arizona-New Mexico issue that has apparently been lingering since 1968.

And finally, I am pleased to acknowledge the hard work and leadership of my colleague from the U.S. Senate, Senator Jon Kyl. Senator Kyl, I believe you to be the right man at the right time to move this along and get this done.

At the center of the legislation we are here today to consider is an effort to do justice to all Indian tribes in Arizona. By any measure, Indian tribes, especially those in Arizona, have given much more to the United States than they have received in return. Although Arizona includes more reservations and reservation land than any other State, we should not lose sight of the fact that all of the remaining land was in some way ceded by an Arizona Indian tribe. Of course, the contributions made by Native Americans and throughout Indian country continue on today, including involvement in our State's economy, and as the State of Arizona makes clear in its testimony, through dedication and service in our nation's armed forces.

In my estimation, this legislation represents a new era in Arizona and Federal relations with Indian tribes. First, this is an agreement that originated in Indian country. Second, it is not a handout. It includes bargained-for exchanges between all of the parties to the settlement. No one got everything they wanted, and in some cases, some parties had to settle for less than they believe they deserved. But the town of Autumn Nation and the Gila River Indian Community have taken the stand that, on balance, this

represents a significant step forward for their government and their people.

Every Indian tribe that receives Central Arizona Project water will immediately receive a benefit from this legislation because it provides decades of relief from certain charges that apply to their CAP water. In addition, those Indian tribes with existing settlements will have access to a new funding source to pay for the components of their settlement agreements. This same funding source will be available to settle any remaining tribal water rights claims in Arizona.

While this legislation aids Arizona Indian tribes, it also provides benefits to the overwhelming majority of Arizona's citizens. First, by resolving Arizona's dispute over CAP repayment and over the division of CAP water, Arizona can effectively manage its scarce water resources. For decades, Arizona has made groundwater management one of its highest priorities, and this legislation builds upon this effort. Water management is nearly impossible without certainty of supply and priority. Through the negotiations affirmed by this legislation, we can have that certainty without waiting years or even decades for court rulings.

Mr. Chairman, colleagues, ladies and gentlemen, I am hopeful that today's testimony will focus on how we can resolve any remaining issues and get this important legislation done as quickly as possible.

Again, thank you, Mr. Chairman. I yield back.

[The prepared statement of Mr. Hayworth follows:]

Statement of The Honorable J.D. Hayworth, a Representative in Congress from the State of Arizona

I would like to begin by thanking Chairman Pombo and the Chairman of this Subcommittee, Mr. Calvert and the Vice Chairman, my friend from Arizona, Rick Renzi, for scheduling this hearing today. I would also like to personally thank the witnesses for traveling so far to be here today to testify. In particular, I know that in addition to the tribal chairpeople who are here to testify, a number of my friends who serve on the tribal councils and as tribal administrators, as well as many other Arizonans also join us today in the audience.

Because of time-constraints we will only have one witness representing the State of Arizona, but I am informed that you have secured formal approval of the settlement agreement from most of the cities, towns, irrigation districts, and water purveyors in Arizona that are incorporated in the settlement framework.

We are also joined today by our friends from New Mexico. It is my understanding that Arizona and New Mexico interests have been able to reach an agreement that will resolve some of the claims that are currently in dispute between water users in our two states. I am hopeful that this successful effort will soon translate into a successful resolution on another Arizona-New Mexico issue that has apparently been lingering since 1968.

Finally, I would like to acknowledge the hard work and leadership of my colleague from the United States Senate, Senator Jon Kyl. Senator Kyl is the right man at the right time to get this done.

At the center of the legislation that we are here today to consider is an effort to do justice to all Indian tribes in Arizona. By any measure, Indian tribes, especially in Arizona, have given much more to the United States than they have received in return. Although Arizona includes more reservations and reservation land than any other State, we should not lose sight of the fact that all of the remaining land was in some way ceded by an Arizona Indian tribe. Of course, the contributions made by Indians and Indian country continue on through today including involvement in the State's economy and, as the State of Arizona makes clear in its testimony, through dedication and service in our Nation's armed forces.

In my estimation, this legislation represents a new era in Arizona and federal relations with Indian tribes. First, this is an agreement that originated in Indian country. Second, it is not a hand-out. It includes bargained-for exchanges between

all of the parties to the settlement. No one got everything they wanted, and, in some cases, they had to settle for less than they believe they deserve. But the Tohono O'odham Nation and the Gila River Indian Community have taken the stand that, on balance, this represents a significant step forward for their government and their people.

Every Indian tribe that receives Central Arizona Project water will immediately receive a benefit from this legislation because it provides decades of relief from certain charges that apply to their CAP water. In addition, those Indian tribes with existing settlements will have access to a new funding source to pay for the components of their settlement agreements. This same funding source will be available to settle any remaining tribal water rights claims in Arizona.

While this legislation aids Arizona Indian tribes, it also provides benefits to the overwhelming majority of Arizona citizens. First, by resolving Arizona's dispute over CAP repayment and over the division of CAP water, Arizona can manage its scarce water resources. For decades, Arizona has made groundwater management one of its highest priorities. This legislation builds upon that effort.

Water management is nearly impossible without certainty of supply and priority. Through the negotiations affirmed by this legislation, we can have that certainty without waiting years or even decades for court rulings.

I am hopeful that today's testimony will focus on how we can resolve any remaining issues and get this important legislation done as quickly as possible.

Mr. CALVERT. I thank the gentleman.

If there are any other additional opening statements, I would ask that we would put them off until after our first panel gives their testimony to allow them to return to their duties.

With that, I would like to recognize the first panel, our friend and former colleague here in the House, Senator Jon Kyl, United States Senator, State of Arizona, who will testify on H.R. 885. Senator?

**STATEMENT OF HON. JON KYL, A UNITED STATES SENATOR
FROM THE STATE OF ARIZONA**

Senator KYL. Thank you very much, Mr. Chairman. I thank Representative Nethercutt for allowing me to go first here. Thank you, Mr. Chairman. I thank Representative Hayworth for a fine statement, for his cosponsorship of the bill, and both Representatives Grijalva and Renzi for their assistance in getting this hearing scheduled. We appreciate it very much.

The water users of Arizona have waited a long time for this day, and I just hope you can appreciate the significance that all of the people behind you feel, the fact that you are holding this hearing. That is very much why I appreciate it. It is really the product, this legislation, of about 14 years of negotiation and litigation and then negotiation again.

Virtually every major water user and provider in Central Arizona has devoted itself to the passage of this bill. In fact, H.R. 885 would codify the largest water claims settlement in the history of Arizona. The three titles in the bill represent the tremendous efforts of literally hundreds of people in Arizona, as well as Washington, D.C., over this period of 14 years. Looking ahead, this bill could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project.

Since Arizona began receiving CAP water from the Colorado River, litigation has divided water users over how the CAP water should be allocated and exactly how much Arizona was required to repay the Federal Government. Recall that, I think wisely, other States required of Arizona a payback of a portion of the CAP if the

Federal Government was going to up-front the costs. There has now been a settlement between the U.S. Government and the State of Arizona as to how much that repayment should be. So the bill, among other things, codifies that settlement and it also resolves once and for all the allocation of all of the remaining CAP water, as I said.

The final allocation provides necessary stability for State water authorities to plan for Arizona's future water needs, and in addition, approximately 200,000 acre feet of CAP water will be made available under this settlement to settle various Indian water claims in the State.

The bill would also authorize the use of the Lower Colorado River Basin Development Fund, which is funded solely from revenues paid by Arizona entities, to construct irrigation works necessary for the tribes with Congressionally approved water settlements to use their CAP water.

Mr. Chairman, Title II of the bill settles the water rights claims of the Gila River Indian Community, allocating nearly 100,000 acre feet of CAP water to the community and providing funds to stabilize the costs of delivering CAP water and to construct the facilities necessary to allow the community to fully utilize the water that it has been allocated.

Title III provides for long-needed amendments to the 1982 Southern Arizona Water Settlement Act for the Tohono O'odham Nation, and that has never been fully implemented.

The bill will allow Arizona cities to plan for the future, as I said, knowing how much water they can count on. The Indian tribes will finally get wet water, not just the paper water rights that they have had in the past, and projects to use that water. In addition, mining companies, farmers, irrigation delivery districts, and others can continue to receive water without the fear that they will be stopped by litigation.

There are some minor issues that remain, as Representative Hayworth said, but we have every confidence that those issues can be resolved before we mark up the legislation, and I made that commitment in the hearing that we had in the Senate just a couple of days ago.

In particular, the States of Arizona and New Mexico have been negotiating the best way to address New Mexico's rights under the 1986 Boulder Canyon Act to exchange 18,000 acre feet of CAP water on the Gila River. They are meeting regularly and report that they are making progress in those negotiations.

In addition, I hope that negotiations with the San Carlos Apache Tribe will move forward so that their claims can be resolved by the legislation. We have made it clear by leaving a title open in the legislation that if they would like to negotiate their claims, there is a place in the bill for those claims to be resolved and, if not, that is a decision that they have to make. But in any event, that opportunity is available.

In summary, the bill is vital to the citizens of Arizona. It will provide certainty needed to move forward with water use decisions. Furthermore, the United States can avoid litigating water rights and damage claims and satisfy its trust responsibilities to the tribes. The parties have worked many years to reach consensus

rather than litigate, and I believe the bill represents the best opportunity to achieve a fair result for everyone.

Mr. Chairman, might I make just one final comment. I thought the hearing that was held in the Senate did something very good. The record is full of all of the good things that this legislation will do. Representative Hayworth and I just barely touched on what this means to the people in Arizona. But we went right back to business, rolled up our sleeves in the previous hearing, by focusing really on the remaining concerns, the things that have to be done. That is what we want the people of this Committee to know, not just all of the good things, but the few things that we remain working on, and especially Bennett Raley from the Department of Interior will identify things the Department is working on so you will know exactly what is left to do before we can conclude this settlement. So I count that as good news, not something that we should be concerned about.

I am very appreciative of all of the people behind me who have worked so hard to make this settlement a reality and I thank you again for giving them the opportunity to be here and to see that we can move this legislation forward.

[The prepared statement of Mr. Kyl follows:]

**Statement of The Honorable Jon Kyl, a U.S. Senator
from the State of Arizona**

Chairman Calvert, and members of the Subcommittee, I would first like to thank you for holding this hearing and allowing me to testify. My special thanks also go to my colleague, Rep. Hayworth, for sponsoring this important legislation and shepherding it through the Congressional process. The water users and providers of Arizona have waited a long time for this day. The bill before your committee, the Arizona Water Settlements Act (H.R. 885), is the product of fourteen years of negotiation, litigation, and more negotiation. Virtually every major water user and provider in central Arizona has devoted itself to the passage of this bill. In fact, H.R. 885 would codify the largest water claims settlement in the history of Arizona. The three titles in this bill represent the tremendous efforts of literally hundreds of people in Arizona and here in Washington over a period of fourteen years. Looking ahead, this bill could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project (CAP) itself.

Since Arizona began receiving CAP water from the Colorado River, litigation has divided water users over how the CAP water should be allocated and exactly how much Arizona was required to repay the federal government. This bill will, among other things, codify the settlement reached between the United States and the Central Arizona Water Conservation District over the state's repayment obligation for costs incurred by the United States in constructing the Central Arizona Project. It will also resolve, once and for all, the allocation of all remaining CAP water. This final allocation will provide the stability necessary for state water authorities to plan for Arizona's future water needs. In addition, approximately 200,000 acre-feet of CAP water will be made available to settle various Indian water claims in the state. The bill would also authorize the use of the Lower Colorado River Basin Development Fund, which is funded solely from revenues paid by Arizona entities, to construct irrigation works necessary for tribes with congressionally approved water settlements to use CAP water.

Mr. Chairman, Title II of this bill settles the water rights claims of the Gila River Indian Community. It allocates nearly 100,000 acre-feet of CAP water to the Community, and provides funds to subsidize the costs of delivering CAP water and to construct the facilities necessary to allow the Community to fully utilize the water allocated to it in this settlement. Title III provides for long-needed amendments to the 1982 Southern Arizona Water Settlement Act for the Tohono O'odham Nation, which has never been fully implemented.

This bill will allow Arizona cities to plan for the future, knowing how much water they can count on. The Indian tribes will finally get "wet" water (as opposed to the paper claims to water they have now) and projects to use the water. In addition,

mining companies, farmers, and irrigation delivery districts can continue to receive water without the fear that they will be stopped by Indian litigation.

While some minor issues remain, we have every confidence that these issues will be resolved before we mark-up the bill. In particular, the states of Arizona and New Mexico have been negotiating the best way to address New Mexico's right under the 1968 Boulder Canyon Project Act (authorizing the CAP) to exchange 18,000 acre-feet of CAP water on the Gila River. The states are meeting regularly and report that they are making progress. In addition, we hope that negotiations with the San Carlos Apache Tribe will move forward so that all claims can be resolved by this bill.

In summary, this bill is vital to the citizens of Arizona and will provide the certainty needed to move forward with water use decisions. Furthermore, the United States can avoid litigating water rights and damage claims and satisfy its trust responsibilities to the Tribes. The parties have worked many years to reach consensus rather than litigate, and I believe this bill represents the best opportunity to achieve a fair result for all the people of Arizona.

Mr. CALVERT. Thank you, Senator, for your testimony. I know you have to get back a couple hundred yards away here, and so we appreciate your coming today and look forward to working with you on this legislation.

Next, The Honorable George Nethercutt, U.S. House of Representatives. The gentleman is recognized.

STATEMENT OF HON. GEORGE R. NETHERCUTT, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. NETHERCUTT. Thank you, Mr. Chairman, and thanks to the Ranking Member and members of the Subcommittee for holding this hearing and giving me the opportunity to provide testimony in support of H.R. 1753. It was introduced jointly with me and Congressman Norm Dicks of my State of Washington, and we urge that the Subcommittee take action with respect to this legislation.

It would provide a settlement to the Spokane Tribe of Indians for losses suffered as a result of the construction of the Grand Coulee Dam in my State. I don't know if any members of the Subcommittee have had a chance to see this dam. It is the largest concrete dam in the world. It is the largest producer of hydroelectricity in the United States. It is the third largest producer of electricity in the world. So it is a huge structure. It is a mile across and it is a site to behold.

The importance of mentioning that project is that it had a serious and detrimental impact on tribes that surround the Grand Coulee Dam area. The Spokane Tribe, the Colville Confederated Tribes were deeply impacted by this construction that provides cost-based hydroelectric power to the citizens of the Pacific Northwest and it had an impact on the fisheries, resources, and the traditional heritage of these tribes.

It is a complicated issue that surrounds the history of the Grand Coulee Dam and its impact on the tribes, the Colville Tribe and the Spokane Tribe. This legislation would provide a settlement to the Spokane Tribe, which has been lacking in a settlement with the U.S. Government for the taking of the lands and the fishing rights and the other consequences of the dam over a period of years since 1941.

Similar legislation was created and enacted in 1994 to compensate the Colville Tribe, with the difference being that the

Colville Tribes maintained the legal claim against the USA dating back to 1951. The claim held by the Colville Tribes was a land claim that the tribe was able to amend in 1976 to cover damages arising from the construction and operation of the Grand Coulee. While the Spokane Tribe had filed similar land claims, the tribe had entered into settlement negotiations in 1967, approximately 9 years prior to any indication that the United States might attempt to limit or eliminate its obligations to the tribes regarding the Grand Coulee Dam. So as a consequence, the Spokane Tribe did not have a pending Indian Claims Commission claim to amend in 1976 as did the Colville Confederated Tribes.

So this legislation, the legislation which enacted the settlement for the Colville Tribes provided for a cash lump-sum payment and annual payments in the tens of millions to the tribe, representing the ongoing proceeds from the sale of hydropower, monitored, administered by the Bonneville Power Administration, which is the power marketing agency in our region.

At that time, the House Resources Committee noted that the Spokane Tribe has a moral claim and requests that the Department of Interior and the Department of Justice work with the Spokane Tribe to develop a means to address the Spokane's claim. In 1997, the BPA, Bonneville Power Administration, entered into negotiations with the tribe. There were some meetings. No settlement was reached.

The tribe wants 39.4 percent, the same percentage as the Colville Tribe, the Spokane Tribe that is the subject of this legislation. We had negotiations a year ago. I moderated those. We thought we were pretty close to a settlement, about 29.3 percent as a compromise. That broke down, didn't occur. The latest offer we see from the Bonneville Power Administration through the Department of Energy is 19.2 percent one-time annual payment and then 19.2 percent structured catch-up payments thereafter.

We think that is inadequate. I believe it is inadequate. The tribe believes it is inadequate. It is not fair.

This is a matter of equity and fairness, Mr. Chairman, members of the Subcommittee. We are expecting that this legislation will spur negotiations, we will have a chance to sit down further with Bonneville Power Administration and the tribe. I am fearful that there won't be any further negotiations unless this legislation is enacted. This is a matter of fairness and equity to the Spokane Tribe. They have proceeded in good faith from day one, back 30 and 40 years ago, 50 years ago, and now they are on the short end of this negotiation stick. We believe it is fair that they receive this fair consideration by enactment of this legislation so that they can be equitably treated as the Department of Justice and the government and this Committee and others have said they are entitled to.

So I am happy to be here to testify in support of this bill and urge your favorable consideration.

Mr. CALVERT. I thank the gentleman. So you believe as this process moves forward that you potentially could find some middle ground on this issue if the folks from Bonneville negotiate in good faith?

Mr. NETHERCUTT. Yes, sir, I do. I think we are between \$20 and \$90 million apart. We can reach a settlement if we have a chance

to get some pressure added to both sides to sit down, negotiate in good faith, and get this resolved. But the offer on the one end is way too low and the Spokane Tribe is willing to come off its higher offer, the same fair offer that the Colville Tribes got, the 39.4 percent.

So there is some middle ground here that can be reached, in my judgment. We thought we had it reached. It broke down. It is time to get back to the table and really seriously, in good faith, negotiate and get this off everybody's table.

Mr. CALVERT. I thank the gentleman.

Any additional questions for Mr. Nethercutt?

[No response.]

Mr. CALVERT. Seeing none, we thank our colleague for coming today and we appreciate your testimony.

Mr. NETHERCUTT. Thanks for having me.

[The prepared statement of Mr. Nethercutt follows:]

Statement of The Honorable George R. Nethercutt, Jr., a Representative in Congress from the State of Washington

Mr. Chairman and Members of the Committee, thank you for holding this hearing today and for the opportunity to present testimony today in support of H.R. 1753. This legislation would provide a settlement to the Spokane Tribe of Indians for losses suffered as a result of construction of the Grand Coulee Dam.

Similar settlement legislation was enacted in 1994 to compensate the neighboring Confederated Colville Tribes with the difference being that the Colville Tribes maintained a legal claim against the United States dating back to 1951. The claim held by the Colville Tribes was a land claim that the Colville Tribes were able to amend in 1976 to cover damages arising from the construction and operation of Grand Coulee Dam. While the Spokane Tribe had filed similar land claims, the Tribe had entered into settlement on those claims in 1967, approximately nine years prior to any indication that the U.S. might attempt to limit or eliminate its obligations to the Tribes regarding Grand Coulee Dam. As a consequence, the Spokane Tribe did not have a pending Indian Claims Commission claim to amend in 1976 as did the Colville Tribes.

The legislation which enacted a settlement to the Colville Tribes provided for a \$53 million lump sum payment for past damages payable by the U.S. Treasury's Judgment Fund and roughly \$15 million annually from the ongoing proceeds from the sale of hydropower by the Bonneville Power Administration. At that time, the House Resources Committee noted "that the Spokane Tribe has a moral claim and requests that the Department of the Interior and the Department of Justice work with the Spokane Tribe to develop a means to address the Spokane's claim."

In 1997, BPA entered into negotiations with the Spokane Tribe and several meetings occurred without fruitful progress. I then introduced legislation in 1999 to provide a settlement to the Spokane Tribe directly proportional to the settlement afforded the Colville Tribes based upon the percentage of lands appropriated from the tribe for the Grand Coulee Project, or approximately 39.4 percent of the past and future compensation awarded the Colville Tribes.

Negotiations resumed and at the last meeting held in Spokane, on January 14, 2002, which I moderated, the Tribe presented what it believed to be a "middle ground" settlement offer equaling 29.3 percent of the Colville settlement and a one time "catch up" payment of \$29,234,000 that would cover back payments from Fiscal Year 1995 (the time when the Colville settlement was enacted) through 2002. The Tribe agreed to defer the receipt of the "catch up" payments in the first years following the settlement to ease passage of the legislation through Congress. In addition, the Tribe remained open to discussing alternative payment structure arrangements that would ease the impact on BPA ratepayers. The Administrator of BPA stated at this meeting that he felt a middle ground had been reached and he would "run the numbers" and respond to the Tribe within two weeks. We all left that meeting, Mr. Chairman, thinking that a settlement had been reached.

Four months later, on May 15, 2002, the Administrator of BPA finally responded to the Tribe's last offer, with a one-time promise of annual payments of 19.2 percent of the Colville settlement and a 19.2 percent structured "catch up" payment covering

FY 1995 through FY 2002. The difference between the two proposals was estimated at the time to be between \$20 million and \$90 million.

Unfortunately, I believe we have now reached a point where negotiations between BPA and the Tribe will proceed no further without additional direction from Congress. Therefore, I request that you approve this legislation so that the Federal Government may keep the word of our Nation to the Spokane Tribe.

Mr. CALVERT. I would now like to—excuse me. Are there any additional opening statements? Mr. Renzi?

**STATEMENT OF HON. RICK RENZI, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. RENZI. Thank you, Chairman Calvert and members of the Committee. I want to take this opportunity to provide brief remarks on H.R. 885, the Arizona Water Settlement Act.

I would like to begin by welcoming all of our speakers today, specifically those speakers from the First District of Arizona, especially San Carlos Apache Chairwoman Kathy Kitcheyan and members of the Tribal Council, as well as Navajo Nation President Joe Shirley. I want to thank you all for traveling to Washington, D.C., for being here, my friends from the Apache Nation. Both the White Mountain Apache Nation and the Avapaya Apache and the Tonto Apache have provided written testimony, and I appreciate your participation in this process.

I know this legislation has taken years to draft and negotiate, has resulted in parts of it that remain complex. I recognize that a hearing on this Arizona Water Settlements Act is an important first step in the legislative process. And while all parties are aware that we still may address some issues, as Senator Kyl has discussed, I am hopeful that these final issues can be worked out and that the settlement can occur specifically to benefit all parties involved.

I want to thank you for the opportunity to open with these remarks. I look forward to hearing the testimony.

[The prepared statement of Mr. Renzi follows:]

**Statement of The Honorable Rick Renzi, a Representative in Congress from
the State of Arizona**

Chairman Calvert and members of the committee, thank you for the opportunity to provide brief remarks on H.R. 885, the Arizona Water Settlements Act.

I would like to welcome all of our speakers today, specifically those speakers from the First District of Arizona, San Carlos Apache Chairwoman Kathy Kitcheyan and Navajo Nation President Joe Shirley. Thank you for traveling to Washington, D.C., to discuss your interest in this legislation. In addition, written testimony has been submitted by several other tribes in my district, the White Mountain Apache, Yavapai Apache and Tonto Apache. I appreciate the participation by all of these tribes.

This legislation has taken years to draft and negotiate and, as a result, is extremely complex. I recognize that a hearing on the Arizona Water Settlements Act is an important first step in the legislative process. While all parties are aware that issues need to be addressed in the Arizona Water Settlements Act, I am hopeful that these final issues can be worked out.

Thank you for the opportunity to provide opening remarks and I look forward to listening to the testimony today.

Mr. CALVERT. I thank the gentleman.
Any additional opening statements? Mr. Pearce?

**STATEMENT OF HON. STEVAN PEARCE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NEW MEXICO**

Mr. PEARCE. Thank you, Mr. Chairman. Again, I appreciate the opportunity to speak on this bill and I appreciate you holding the hearings on H.R. 885. I welcome those who have worked hard to reach a tentative agreement to bring this bill before you.

I especially want to welcome Estevan Lopez, the Chairman of the New Mexico Interstate Stream Commission, who is going to testify today.

This is a very important bill that settles some difficult issues in Arizona and New Mexico that have divided friends and neighbors for quite some time. It seems that in the West, as you know, Mr. Chairman, water may be the most contentious issue facing us all. Reaching agreement seems to be taking decades, as evidenced by the authorizing legislation originally passed in 1968, and we are now ready to move forward with settlement soon. I understand the issue of diversions in the Riordan Valley in New Mexico are settled. The issue of further development of the Gila River Basin water in New Mexico remains unsettled.

Thirty-five years ago, as part of the 1968 Colorado River Basin Project Act, the New Mexico Unit of the Central Arizona Project was authorized, conceived to provide the future water supply in Southwestern New Mexico. Before this legislation is enacted, we must ensure the promises made to New Mexico in 1968 is fulfilled. Negotiations are still ongoing to settle outstanding issues and are progressing. We are committed to working with Senator Kyl and Representative Hayworth to bring this settlement to conclusion and to support the settlement once New Mexico's concerns are resolved.

Thank you, Mr. Chairman, for the opportunity to speak to this issue.

[The prepared statement of Mr. Pearce follows:]

**Statement of The Honorable Stevan Pearce, a Representative in Congress
from the State of New Mexico**

Thank you Mr. Chairman for holding this hearing on H.R. 885, and I welcome those who have worked hard to reach a tentative agreement in order to bring this bill before you.

This is a very important bill that settles some very difficult water issues in Arizona and New Mexico that have divided friends and neighbors for quite some time. It seems that in the West, as you know Mr. Chairman, water may be the most contentious issue. Reaching agreements seem to take decades, as evidenced of the authorizing legislation originally passing in 1968, and we are now ready to move forward with the settlements soon.

I understand the issue of diversions in the Virden Valley in New Mexico is settled. The issue of further development of Gila River Basin water in New Mexico remains. Thirty-five years ago, as part of the 1968 Colorado River Basin Project Act, the New Mexico Unit of the Central Arizona Project was authorized—conceived to provide the future water supply in Southwestern New Mexico. Before this legislation is enacted, we MUST assure the promise made to New Mexico in 1968 is fulfilled.

Negotiations are still ongoing to settle outstanding issues, and are progressing. I am committed to working with Senator Kyl and Representative Hayworth to bring this settlement to conclusion, and to support this settlement once New Mexico's concerns are resolved.

Thank you Mr. Chairman. I yield back the balance of my time.

Mr. CALVERT. I thank the gentleman from New Mexico.
The gentleman from Arizona, Mr. Grijalva.

**STATEMENT OF HON. RAUL GRIJALVA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Mr. GRIJALVA. Thank you, Mr. Chairman. I, too, want to acknowledge the fine work that Senator Kyl and my colleague, Representative Hayworth, have done on this H.R. 885. It is very important to the State of Arizona, very important to the nations that are represented here, Tohono O'odham Nation, the Gila River Indian Nation and Community, and both of their—Chairwoman Vivian Saunders is here and I want to welcome and thank her for coming and giving testimony to this Committee. Governor Narcia is also here and I want to thank him for his effort on this legislation.

There are unresolved issues, but the momentum and the work that both the community and all the interests in the State of Arizona have done to this point have brought us to this hearing, and I want to acknowledge the hard work and the efforts that they put forth. I look forward to a resolution and I look forward to this hearing continuing the momentum to reach a final settlement, to reach a markup, and to give some stability and security both to the Nation and to the State of Arizona in terms of water use.

Thank you, Mr. Chairman.

Mr. CALVERT. I thank the gentleman.

I would now like to recognize the administration, our next panel of witnesses. Testifying on H.R. 885 is Mr. Bennett Raley, Assistant Secretary of Water and Science, Department of Interior, and Assistant Secretary Raley is accompanied by Ms. Aurene Martin, Acting Assistant Secretary for Indian Affairs.

Testifying on H.R. 1753 is Mr. Steven Hickok, Deputy Administrator of the Bonneville Power Administration.

I would now like to recognize Mr. Bennett Raley to testify for 5 minutes on H.R. 885. The gentleman is recognized.

**STATEMENT OF BENNETT W. RALEY, ASSISTANT SECRETARY
FOR WATER AND SCIENCE, DEPARTMENT OF THE INTERIOR,
ACCOMPANIED BY AURENE MARTIN, ACTING ASSISTANT
SECRETARY FOR INDIAN AFFAIRS**

Mr. RALEY. Thank you, Mr. Chairman, Congresswoman Napolitano, Mr. Hayworth, and other members of the Committee. We are pleased today to testify on H.R. 885 for the simple reason that the issues addressed in this legislation and the parallel legislation on the Senate side are among the highest priorities for the Department of the Interior. This suite of issues spans the entire scope of the State of Arizona. It addresses, or will address, we hope, issues important to the State of New Mexico, and it is time to bring to closure the untold years of effort that have gone into this work and brought everyone this far.

We have submitted written testimony, Mr. Chairman, which contains detailed comments on the legislation, but what I would like to do at this time is to observe that from the Department's standpoint, we are within striking distance of success, and one never knows when a window of opportunity is presented like it is here. If the parties don't take that opportunity to close the final gap, the window may never open again, or it may be decades down the road.

The window is open. We are within striking distance, and we pledge on behalf of the Department our utmost efforts to work with this Committee and Mr. Kyl in the Senate to bring this to closure, because it is good for the State of Arizona. We trust it will be good for the State of New Mexico. And it will be a key part of providing certainty for resource users in those States.

We would observe that there are three areas that need particular attention. First of all, the funding mechanism that is in H.R. 885 is innovative but does not follow the normal appropriations process. The administration is currently studying that funding mechanism to determine if it is an appropriate way to provide the certainty for funding that is required under the settlement stipulation and other aspects of this compromise.

Second, as this Committee well knows, the Department, the Secretary of Interior, has trust responsibility to Native American tribes which extend to all tribes, and in particular we would encourage the parties to redouble their efforts to address issues relating to the San Carlos Apache Tribe so that all of the in-basin issues in Central Arizona can be resolved and we don't end up leaving an important part unresolved and potentially a source of concern in the near future.

Third, the Department deeply desires that the States of Arizona and New Mexico find common ground so that both may move forward and attain the goals of the 1968 Act. We are comfortable that the delegations of these two States that we treasure will be able to do that and we will lend our efforts if that is helpful, or if it is helpful for us to stay back and stay out of the way, we will do that, as well.

With that, Mr. Chairman, I would direct any other questions to the written testimony and would like to allow Assistant Secretary Martin to make any comments that she has. Thank you.

[The prepared statement of Mr. Raley follows:]

**Statement of Bennett W. Raley, Assistant Secretary for Water and Science,
U.S. Department of the Interior**

Good morning Mr. Chairman and members of the Committee. I am Bennett W. Raley, Assistant Secretary for Water and Science at the Department of the Interior. I am accompanied by Aurene Martin, Acting Assistant Secretary for Indian Affairs. I appreciate the opportunity to appear before this Committee to discuss H.R. 885, a bill to authorize the Arizona Water Rights Settlement Act of 2003.

H.R. 885 is the single most far-reaching piece of federal legislation regarding water use within Arizona since Congress authorized the Central Arizona Project thirty-five years ago. H.R. 885 is an impressive and complex bill, designed to provide a comprehensive resolution of critical water use issues facing the State of Arizona, and Arizona Indian tribes today. This legislation provides certainty regarding the use of water in Arizona in a number of ways: It provides water to settle outstanding water rights claims of certain Arizona tribes; provides financing of infrastructure so that all tribes can put CAP water to use; and it provides water for future water rights settlements. It also provides water necessary to accommodate the explosive population growth in the cities of central Arizona; it provides certainty for farmers who currently utilize imported water supplies from the Colorado River; and it also provides a mechanism to secure water to protect against future droughts. These arrangements, necessary to all users of Colorado River water in Arizona are accomplished utilizing local tax revenues to accomplish the financing of all undertakings under the global settlement embodied in the legislation.

The Administration supports the core concepts of the settlements that are achieved through H.R. 885 and the overarching goal of resolving many important water challenges facing the State of Arizona, with the caveats discussed below. We believe that the comprehensive approach that is embodied in H.R. 885 is the right

way to resolve these longstanding disputes regarding the use of the CAP and this portion of Arizona's allocation to the Colorado River.

Before providing detailed comments on particular provisions of the bill, some of which will require addressing outstanding concerns, it is necessary to review the overall structure and goals of H.R. 885. As we move forward, this Administration remains committed to working with the Committee, Congressman Hayworth, Senator Kyl, and the settlement parties to reach mutually agreeable solutions to all remaining issues. The resolution of these outstanding issues is an extremely high priority for the Department of the Interior.

Background

Even in the days before statehood, Arizona's leaders saw the need to bring Colorado River water to the interior portions of the State. During the 1940's and '50's California developed facilities allowing the utilization of more than its apportionment from the Colorado River and quickly began full use of its share of the river, and more. During that same time, Arizona began developing its own plans for utilization of its 2.8 maf apportionment. However, California effectively prevented Arizona from implementing its plans, arguing that development and use of water from Colorado River tributaries within Arizona counted against its apportionment and limited significant additional development and diversion from the mainstream by Arizona.

Unable to reach resolution on this issue, in 1952 Arizona brought an original action in the U.S. Supreme Court, asking the Court to clarify and support Arizona's apportionment from the Colorado. After 12 years of fact finding by a Special Master and arguments by the two states, the Supreme Court issued a decision in 1963 affirming Arizona's 2.8 maf apportionment.

Despite Arizona's victory in the Supreme Court, California was still able to extract a final concession from Arizona. In exchange for California's support of Congressional authorization in 1968 for the Central Arizona Project (CAP), Arizona was forced to allow its CAP water to have a subservient priority to California water use during times of shortage on the Colorado River system. This was a significant concession since CAP water use represents more than half of Arizona's Lower Basin apportionment—approximately 1.5 maf of its 2.8 maf. The CAP brings this critical supply from the Colorado River through Phoenix to Tucson, Arizona, via a primary canal of more than 330 miles.

After decades of fighting to get the CAP authorized and constructed, in the early 1990's Arizona faced financial and water supply disputes over how the Project—and the State's allocation from the Colorado River—would be utilized.

For most of the 1990's uncertainty existed for Arizona: uncertainty over who would receive water from the CAP, and uncertainty over the costs of the project and who would repay those costs. Perhaps most importantly to the State, uncertainty existed over the ability of the State to store water and protect against the eventual shortages on the Colorado—which have a unique impact on Arizona water users due to the junior status imposed by Congress in 1968.

The uncertainty also involved complex and contentious litigation filed in 1995 between the federal government and the Central Arizona Water Conservation District, the political entity which operates the CAP and repays the local costs of the project. After years of litigation over the CAP, extensive negotiations were conducted to resolve the complicated CAP issues so that the needs of all project beneficiaries would be adequately addressed.

During these discussions it became clear that financial repayment and other operational issues could not be resolved until there was a firm agreement on the amount of CAP water that would be allocated to federal uses, i.e., allocations to Indian tribes in Arizona. When these discussions were initiated, 32% of the CAP water was allocated for Federal uses, 56% for Non-Federal uses and 12% was un-contracted.

Both the United States and the State of Arizona were interested in dedicating un-contracted water to allow settlement of outstanding Indian water rights claims and to meet emerging needs for municipal purposes. The amount of water needed for future Indian water rights settlements within Arizona turned in large part on consideration of the large pending claim of the Gila River Indian Community (Community) in the on-going general stream adjudication of the Gila River system. The Gila River Indian Reservation encompasses approximately 372,000 acres south of, and adjacent to, Phoenix, Arizona.

The claim filed by the United States on behalf of the Community in the Gila River adjudication was for 1.5 million AFA. This represents the largest single Indian claim in Arizona—and one of the largest Indian claims in the West. If this claim were successful, the amount of water available to central Arizona cities, towns,

utilities, industrial and commercial users, and major agricultural interests would be greatly reduced.

Consequently, ongoing negotiations of that claim were put on a parallel track with the CAP litigation negotiations, with the understanding that tandem resolution of the issues would be necessary. The underlying premise of the settlement that emerged—including the framework of this legislation—is to achieve a comprehensive resolution of all outstanding CAP issues. This, in turn, will allow sustainable operation of the CAP in a manner that provides benefits and equitable treatment to all intended project beneficiaries. The alternative, piecemeal and sequential resolution of all of the outstanding disputes on the CAP, would be doomed to fail.

The linkage embodied in this legislation integrates U.S. obligations under Federal statutes and the trust relationship with Indian tribes. As with the initial authorization of the CAP in 1968, we are presented with a unique opportunity to provide a final settlement of many of the complex Federal, State, Local, Tribal and private water issues in the State.

In May of 2000, the Department and CAWCD reached agreement on a stipulated settlement of the CAP litigation. This stipulation serves as a blueprint for a comprehensive resolution of the suite of CAP issues I have identified above. The stipulation requires that a number of conditions must occur before it is effective or final. Under the stipulation, these conditions must occur before December 2012 or the stipulation will terminate.

The CAWCD v. U.S. settlement stipulation is contingent on Congressional enactment of a Gila River Indian Community Settlement; Amendment of the Southern Arizona Indian Water Rights Settlement (SAWRSA); and the identification of a firm funding mechanism for the CAP, GRIC and SAWRSA settlements.

Settlement Stipulation & H.R. 885: The Arizona Water Rights Settlement Act of 2003

H.R. 885 approves three separate and significant settlements: the settlement stipulation reached in the CAWCD v. U.S. litigation (addressing CAP operational and repayment issues), the Gila River settlement (addressing water rights claims of the Gila River Indian Community), and the SAWRSA settlement (addressing water rights claims of the Tohono O'odham Nation).

The basic structure of the stipulation developed in 2000 is preserved in H.R. 885, subject to certain conditions. The main components of the settlement contained in H.R. 885 are to provide: (1) additional water to resolve tribal claims; (2) certainty regarding allocation of available water supply; (3) additional water supplies for Arizona's growing cities; (4) financial and operational certainty for CAWCD (operator and repayment entity of CAP); (5) affordable water for non-Indian agriculture; (6) appropriate repayment of CAP costs; (7) structures and programs to bank water for Arizona's future; and (8) a firm funding mechanism to provide affordable water to tribes, while developing the infrastructure necessary to allow all of Arizona's tribes to fully utilize their CAP supplies.

The structure of H.R. 885 represents Arizona's extensive efforts to resolve these contentious issues. The bill is strongly supported by the relevant Arizona State Agencies, Members of Congress with Arizona constituencies, the Gila River Community, the Tohono O'odham tribe, and a wide array of Arizona interests. In light of the diverse parties, competing interests and longstanding controversies involved, H.R. 885, if amended to address certain issues, represents the best prospect to restructure the CAP in a context that reconciles the Public, Tribal and Private interests—including statutory obligations of the United States.

I will summarize each of the three titles contained in H.R. 885 and comment on some of the provisions of each that are of concern to the Administration.

Title I—Central Arizona Project Settlement

The critical components of the CAP stipulated settlement are set forth in Title I of H.R. 885. They include: (1) a final allocation of CAP water supplies so that 47% of Project water is dedicated to Arizona Indian tribes and 53% is dedicated to Arizona cities, industrial users and agriculture; (2) setting aside a final additional allocation pool of 197,500 acre-feet for use in facilitating the GRIC settlement and future Arizona Indian water rights settlements; (3) a final allocation of 65,647 AFA of remaining high priority (M&I) water to Arizona cities and towns; (4) relief from debt incurred under section 9(d) of the 1939 Reclamation Projects Act by agricultural water uses, which allows these users to relinquish their long-term CAP water contracts so that the water can be used for the Indian water rights settlements and future municipal use; and (5) allowing the Colorado River Lower Basin Development Fund (LBDF), the Treasury fund where CAP repayment funds are deposited, to be

used for the costs of Indian water rights settlements, completing tribal water delivery systems and reducing the cost of CAP water for tribes to affordable levels.

H.R. 885's utilization of the Colorado River Lower Development Fund is intended to meet the terms of the stipulation by providing for, among other things, subsidizing fixed OM&R costs for Indian tribes, including OM&R costs for the Gila River Indian Community, rehabilitation of the San Carlos Irrigation Project (SCIP), construction of Indian Distribution Systems, and funds for future Indian water settlements.

The financing mechanism assumed in H.R. 885 is complex, and operates outside of the normal annual appropriations process. Given this, the Administration is currently reviewing the funding provision to determine whether it is an appropriate way to satisfy the contingencies of the settlement. There may be other funding mechanisms that meet the firm funding requirement of the settlement. We look forward to working with the Committee on this issue.

Title II—Gila River Indian Community Water Rights Settlement

Title II of H.R. 885 is the Gila River Indian Community Settlement. This settlement would resolve all of the Community's water rights claims in the general stream adjudication of the Gila River system, litigation that covers much of the water supply of central Arizona. This litigation has been the subject of negotiation and settlement talks for more than 13 years.

The major components of the settlement are: (1) confirmation of existing, and dedication of additional, water supplies for the Community in satisfaction of its water rights claims; (2) use of existing facilities to deliver the additional water supplies; (3) funding for on-Reservation agricultural development; and (4) protection of the Reservation groundwater supplies.

While the United States supports a settlement of the Gila River Community's water claims, and believes the majority of the provisions of the Settlement Act in this title are consistent with that objective, we do have concerns, detailed below, that we want to work on with the Committee, Congressman Hayworth, Senator Kyl and the various parties to promptly resolve.

A. Inclusion of a Settlement with the San Carlos Apache Tribe

In resolving the water rights claims of the Gila River Indian Community, we must remain mindful not to place the United States in a position of having conflicting obligations to two Indian tribes. The Gila River Indian Community and the San Carlos Apache Tribe have reservations and existing decreed water rights in the same watershed. In litigation underlying the settlement, the United States has argued in favor of both the Gila River Indian Community's and the San Carlos Apache's water rights under the 1935 Globe Equity Decree. That Federal Consent Decree addresses the water rights of those tribes, as well as the rights of most non-Indian water users, in the mainstem of the Gila River above the confluence of the Gila and Salt rivers. The GRIC settlement will alter operations under the Gila Decree. These changes have the potential to impact the rights of the San Carlos Apache Tribe.

We believe that additional efforts to resolve the concerns of the San Carlos Apache Tribe should be taken, and Interior has engaged in a serious effort to do that. The Department has taken a number of steps in this regard and is prepared to do more. Interior officials have met with the San Carlos Tribal leaders on numerous occasions, and our sincere hope is that we can reach resolution on a wide array of issues so that agreement on the San Carlos Apache Tribe's water rights can be added to this legislation as it proceeds. We look forward to working with the Committee and the Tribes on this matter.

B. Waivers of the United States Enforcement Authorities

H.R. 885, as introduced, also includes significant waivers of the United States' ability to enforce environmental statutes relating to water quality in the Gila River basin. The settling parties seek to limit their exposure to environmental liability. However, the Administration believes the waivers, as currently drafted, may provide undue immunity from environmental liability and shift costs for cleanup to the Federal government. This could restrict the ability for the federal government to clean up the most contaminated waste sites in the Gila River Basin. For example, the legislation waives claims by the United States against both parties to the settlement as well as non-parties. As drafted, this legislation can also be interpreted to provide a waiver for future claims under certain environmental statutes, including those under the Superfund authority. This could restrict the ability for the federal government to cleanup the most serious hazardous waste sites in the Gila River Basin. These water quality waivers were not included in prior water rights settlements affecting Indian Tribes and are not necessary in this legislation.

Following the introduction of H.R. 885, the Department of Justice entered into discussions with the settlement parties regarding the waivers. These discussions continue to progress. The Administration is committed to continuing these discussions to find a solution to these significant issues, as this legislation must maintain the Federal government's ability to protect human health and environment.

C. Overly Broad Waiver of the United States Sovereign Immunity

The Administration also is concerned, as we believe that H.R. 885 contains an overly-broad waiver of United States sovereign immunity. We believe that this provision is unnecessary, as sovereign immunity waivers in the McCarran Amendment allow a suit against the United States to administer its adjudicated water rights. Further, if such a waiver is retained, it should be narrowly drafted. The Administration also has some concern about the scope of certain waivers under Section 312 of the bill.

D. Impacts of the Intended Water Exchanges

H.R. 885 authorizes several water exchanges between the Community and various parties in the State, including the Phelps Dodge Corporation, ASARCO and several municipalities in the Upper Gila River watershed. While we support the mechanism of water exchanges, we want to work with the committee to ensure that the current language adequately takes into account the water rights of the San Carlos Apache Tribe, parties affected in the State of New Mexico (under the Colorado River Basin Project Act), listed species and critical habitat under the Endangered Species Act (ESA), and rights to divert water in relation to the Globe Equity Decree. Previous analyses indicate that appurtenant structures and dams involved in this agreement could lead to more extensive and frequent Gila River drying, which, in turn, could lead to potential ESA conflicts.

E. Fifth Amendment Takings Concern

Title II places the ownership of all settlement water in the hands of Gila River Indian Community, notwithstanding the fact that the Gila Decree (the 1935 Globe Equity Decree) framed its award under that Decree "for the reclamation and irrigation of the irrigable Indian allotments on said reservation." We would like to refine the language of the bill to reduce the likelihood that an individual allottee may assert a "takings" claim based on the settlement. Both Interior and Justice are committed to working with the settlement parties and the proponents of H.R. 885 to reduce any risk of a Fifth Amendment taking and to assure that the rights of individual Indian allottees are protected.

F. Costs Associated

Federal contributions to the proposed settlement within this Title include the fulfillment of existing statutory and programmatic responsibilities and the assumption of new obligations designed to put GRIC in a position to utilize the water resources confirmed or granted in the settlement. There are also numerous costs contained within this title, which the United States does not believe are reasonably related to the costs avoided and benefits received, and we look forward to working with the Committee, Congressman Hayworth and Senator Kyl prior to further consideration of this legislation to ensure the costs contained in the legislation are appropriate.

For example, given the correlative benefits, we support the rehabilitation and completion of the Indian portion of the San Carlos Irrigation Project (SCIP)—an irrigation project that was initiated in the 1930's but never completed and which has fallen into significant disrepair. However, we believe that the language of H.R. 885, requiring the Secretary to provide for the "rehabilitation, operation, maintenance and replacement" of the San Carlos Irrigation Project, needs to be refined. Our view is that both the cost control and indexing mechanisms for these expenditures need to be revisited.

Similarly, when looking at the government's cost of addressing subsidence damages on the reservation, we recognize the settlement requires the United States to repair past and future subsidence damage. We believe that federal liability for such damages should be limited.

Additionally, in some instances we believe that existing costs have been shifted from State parties to the United States, and those costs may be more appropriately addressed by other existing Federal programs. We believe disbursements from the Lower Basin Fund should be limited to those costs which have a direct relationship to the core concepts of the settlements addressed in H.R. 885.

We also believe that a closer look should be given to some of the costs included in the provisions of Title II, dealing with the Upper Gila River. One example is the costs identified to line San Carlos Irrigation and Drainage District (the non-Indian component of SCIP) canals so that water can be conserved. The Administration

supports this concept but believes a greater share of the conserved water should be provided to the United States for possible use in settling the San Carlos Apache Tribe's water rights claims in the Gila River.

Title III—Amendments to the Southern Arizona Water Rights Settlement Act (SAWRSA)

The Southern Arizona Water Rights Settlement Act, known as "SAWRSA," Pub. L. 97-293, was enacted in 1982 to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation. SAWRSA did not settle all outstanding Tohono O'odham water rights claims. Claims for the Sif Oidak District and other Reservation lands remain to be settled.

As originally enacted, SAWRSA allocated 37,000 AFA of CAP water to the San Xavier and Shuk Toak Districts of the Nation, together with another 28,200 AFA of water to be delivered from any source by the United States to the Districts. All of the water is to be delivered without cost to the Nation. The original settlement also requires the United States to rehabilitate and extend an historic allottee farming operation and design and construct irrigation facilities sufficient to put remaining settlement water to use.

Construction of all irrigation facilities and the full implementation of SAWRSA has not occurred, principally because of a disagreement over proper allocation of settlement benefits between the Nation and allottees within the San Xavier District. Because of this disagreement, the allottees have refused to join in the dismissal of United States v. City of Tucson, CIV. 75-39 TUC-WDB (D. Ariz.), the litigation which lead to the enactment of the settlement. SAWRSA requires the United States, the Nation and the allottees to dismiss the litigation as a condition of full effectiveness of the settlement.

For over ten years, the Department of the Interior, the City of Tucson and other state parties have been engaged in discussions with the Nation and the allottees in an attempt to agree on amendments that would resolve disputed issues. The Nation and the allottees have now agreed on how settlement water resources and funds should be distributed. The agreements between the Nation and the allottees are contained in Title III of H.R. 885. Essentially, the Nation and the allottees have agreed upon allocation of water resources, construction of new irrigation facilities and sharing of settlement funds.

In general, the Administration supports these agreements and we look forward to working with the Committee to clarify or refine a few items we remain concerned about. Chief among these is the so-called "net proceeds" issue that revolves around the United States' ability to make the Cooperative Fund a self-sustaining fund and potential federal liability if it is not self-sustaining or is underfunded.

Conclusion

It is important to emphasize that the Administration fundamentally supports this important settlement effort if it is amended to address concerns discussed above, and we look forward to working with the Committee to revise specific provisions of the legislation so that we can support the bill without reservation.

The Administration lauds the tremendous efforts dedicated by all parties to find a workable solution to this complex set of issues and supports the core settlement concepts and framework as set forth in H.R. 885. We recognize that this legislation will resolve long-standing and critical water challenges facing the State of Arizona. We look forward to working with the Committee, Congressman Hayworth, Senator Kyl, and the settlement parties to craft legislation that accomplishes these goals in a manner that comports with Federal financial policy and legal considerations.

This concludes my testimony. I would be pleased to answer any questions that the members of the Committee may have.

[Mr. Raley's response to questions submitted for the record follows:]

**Response to questions submitted for the record by Bennett W. Raley,
Assistant Secretary for Water and Science, U.S. Department of the Interior**

Question:

It is my understanding that numerous Indian water rights settlements (including the following Fort McDowell, P.L. 101-628 (1990) §410(a) and San Carlos Apache, P.L. 102-575 (1992) §3709(a)) include a provision that ensures that environmental impact of the components of the settlement agreement and legislation are subject to environmental review subsequent to execution by the Secretary. Can you assure

the Committee that this provision is now routinely included in Indian Water rights settlements, including the Arizona Water Settlements Act?

Answer:

As noted by the Committee, it is common for Indian water rights settlement legislation to include provisions that address environmental compliance regarding actions during the implementation phase of settlements. The Department has consistently carried out all necessary environmental compliance documentation for such implementation actions and will continue to do so. The specific provisions of individual Indian Water rights settlements in this regard are the result of negotiations among the Tribe, the Department, and other relevant stakeholders. In addition, these negotiations often include the participation of potential Congressional sponsors and Congressional staff. While common, it is difficult for the Department to assure the Committee that similar language will be included in all proposed Indian Water rights settlements. As an example, it is appropriate to note that the two cited settlements include distinct provisions regarding environmental compliance. Compare Ft. McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, §§ 410(a)-(d) (1990) with San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. 102-575, §§ 3709(a)-(d) (1992).

With respect to efforts pursuant to the proposed Arizona Water Settlements Act, the Department began work in 1999 on an Environmental Impact Statement on the allocation of CAP water supply and long-term CAP contract execution. In June of 2000, the Department published a Draft EIS on this effort. Appropriations restrictions prevented further work on this EIS subsequent to the publication of the Draft EIS. At this time, however, such restrictions have lapsed and the Department is now preparing to reinstate the EIS process to allow the contracting actions identified as part of the settlement alternative to move forward in advance of the finalized legislation.

Mr. CALVERT. Assistant Secretary, you are recognized.

**STATEMENT OF AURENE MARTIN, ACTING ASSISTANT
SECRETARY FOR INDIAN AFFAIRS**

Ms. MARTIN. Good morning, sir. I would only echo what Mr. Raley has already stated. We are supportive of the core concepts contained in H.R. 885 because they resolve longstanding significant issues for both the Tohono O'odham and the Gila River Indian Community and we believe that they provide sufficient flexibility for resolving other disputes in the State of Arizona.

We do have some outstanding issues which we do need to resolve, including the concerns of the San Carlos Apache, resolution of some individual issues, and immunity and environmental liability issues. But we are very optimistic about our ability to resolve those issues and look forward to working with the different parties. Thank you.

Mr. CALVERT. Thank you.

I would now like to recognize Mr. Steven Hickok to testify on H.R. 1753.

**STATEMENT OF STEVEN G. HICKOK, DEPUTY
ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION**

Mr. HICKOK. Thank you, Mr. Chairman and members of the Subcommittee. With your permission, I will submit my written testimony for the record.

Mr. CALVERT. Without objection, so ordered.

Mr. HICKOK. I am Steve Hickok, Deputy Administrator of Bonneville. The administration, while it is unable to support H.R. 1753 as it is currently drafted, we are definitely in interest of reaching a fair and final settlement of these issues with the Spokanes. I

think in my 5 minutes, I would best serve the Subcommittee by focusing on the two issues that have stood in the way of our reaching a settlement with the Spokanes over the past half-dozen years or so and highlight an issue that may be in front of us if and when we go forward.

First, the method we used in arriving at compensation for the Colville Tribes, if applied to the Spokane Tribe situation, would result in payments to the Spokanes that would be about 19 percent of the amounts that are currently being provided to the Colvilles, not the 39 percent that is currently in the legislation, and the reason is that the method that we used, one of three that we evaluated when we were negotiating with the Colvilles and that had been proposed for use in other situations like this or actually used in the past, the method we used divided the value of the land differently between what is under the reservoir and what is under the dam, and it literally provides half the value of the project to the relatively few acres under the dam and the other half to the relatively large number of acres under the reservoir.

The Colvilles had acreage under the dam and the Spokanes do not, and that is very simply the reason why, if you just do a fraction of the acreage involved under the reservoirs, which is the proposal of the bill, you get 39, whereas the method we used in the Colville settlement produces about half that amount.

The second big issue is that while the Colvilles had made a claim and brought suit against the government for past damages in the window provided under the Indian Claims Act, and the Spokanes had not, we have been willing to establish a sharing of Grand Coulee power revenues on a going-forward basis, but we haven't been willing to resurrect the past damages issue, leaving that closed, basically, after 1951.

Now, having summarized those positions on the two big issues, I should hasten to say that both parties have explored departures from their positions on these issues. Congressman Nethercutt mentioned, for example, that the Spokanes, while holding to their past damages position, had at one point proposed splitting the difference with us between 1939 at 29 percent on the value question. And Bonneville, while holding to the 19 percent position, had at one point in these discussions proposed back-casting 10 years back and structuring a settlement that would provide payments to the Spokanes beginning as if they had begun exactly at the moment that we had settled with the Colvilles. It would pick up the years roughly since 1994 to the present date.

Neither of those concessions by the two parties, though, resulted in a package that either one could support, and in the end, we are back where we started from.

The third issue, look forward, and one that is probably more significant now than pre-2001, is the rates issue on Bonneville's ratepayers. Back in 2001, Bonneville instituted a 45 percent rate increase and that increased the power component of people's bills by 50 percent, from 22 mils a kilowatt hour to 32. And just to put that in perspective, while 1,000 kilowatt hour residents would see the wholesale power component of their bill go up \$10 a month, from \$20 to \$30, the 100,000 megawatt hour a month aluminum smelter

would see their monthly power bill go up from \$2 million to \$3 million a year, and that happened in 2001.

We proposed another rate increase to go into effect in October of this year of another 15 percent, and as your colleagues from the Northwest can attest, there has been a firestorm about whether or not the Northwest economy can stand that, and we took \$381 million out of Bonneville's cost structure for the next 3 years in order to bring that increase down from 15 percent to 2 percent, and that is what we put into place yesterday.

So what would a settlement mean in terms of the cost to the ratepayers of a Colville-type settlement? Well, if you used the H.R. 1753 and it would result in about a \$5 million a year additional cost to Bonneville, that is a sixth of a mil per kilowatt hour, so that 1,000 kilowatt hour house would pay an extra 17 cents a month. It sounds pretty reasonable. And the 100,000 megawatt hour a month smelter would pay another \$17,000 a month in their power bill, and I think that pretty well frames the issue.

Thank you, Mr. Chairman.

Mr. CALVERT. I thank the gentleman.

[The prepared statement of Mr. Hickok follows:]

**Statement of Steven G. Hickok, Deputy Administrator,
Bonneville Power Administration**

Mr. Chairman, my name is Steven G. Hickok. I am the Deputy Administrator of the Bonneville Power Administration (Bonneville). It is my pleasure to appear before the House Resources Committee, Subcommittee on Water and Power. Bonneville appreciates the opportunity to comment on H.R. 1753, the Spokane Tribe of Indians of the Spokane Reservation Grand Coulee Dam Equitable Compensation Settlement Act.

My testimony today will focus on the discussions Bonneville has had with the Spokane Tribe and the proposal the prior Administration made to the Spokane Tribe in response to its request for compensation related to the construction of Grand Coulee Dam. I will also compare that proposal to what would result for the Spokane Tribe if H.R. 1753 were enacted. Finally, I will address the present Administration's concerns with the proposed legislation. Although the Administration is committed to appropriate compensation for the Spokane Tribe, it is unable to support the legislation.

First, let me set out the factual background that gave rise to the Spokane Tribe's request for compensation, which affects our view of the current situation.

Factual Background

This matter arose out of representations made by Federal officials to the Spokane Tribe and the Confederated Tribes of the Colville Reservation when Grand Coulee Dam was under construction in the 1930s. Approximately 2,500 acres of land within the Spokane Reservation and 6,900 acres of land within the Colville Reservation were taken for use in the Grand Coulee Project. Originally, the State of Washington planned to develop a hydroelectric project at Grand Coulee. An agency of the state obtained a preliminary permit under the Federal Power Act to develop the site. Had the state built the project, a license issued under the Federal Power Act would have provided the Spokane Tribe and the Colville Tribes compensation for use of their lands in the Grand Coulee Project. In 1933, however, Congress authorized Federal construction of Grand Coulee Dam as part of the Columbia Basin Project, to be developed and administered by the U.S. Bureau of Reclamation. Federal projects are not subject to licensing under the Federal Power Act.

That same year, Secretary of the Interior Harold Ickes approved two letters from the Department of the Interior—one to the Supervising Engineer of the Grand Coulee Project and one to the Commissioner of Reclamation—indicating that, because Spokane and Colville Tribal land would be taken for the project, each of the Tribes should receive a share of the revenue from the sale of power produced by the dam. The following year, the Assistant Director of Irrigation wrote the Commissioner of Indian Affairs, proposing that the Tribes be paid an appropriate percentage of the "profits" of the project based on the amount of Reservation land beneath the dam

and the reservoir. He proposed that half of the value of the project be ascribed to the dam and half to the reservoir, and that the Spokane Tribe participate in proportion to the Reservation's contact with the reservoir only, as the Spokane Tribe had no land under the dam.

The Government did not act on this proposal, nor did it determine what might be an appropriate share of revenues for either Tribe. In 1946 Congress passed the Indian Claims Commission Act (ICC), creating a five-year window in which Indian tribes could sue the United States for past harms. The Colville Tribes brought suit under the Act for a share of the power revenues of Grand Coulee Dam. Although the Spokane Tribe brought suit against the Government under the Act for other claims, it did not bring a suit for a share of Grand Coulee's revenues prior to settling its ICC claim.

Settlement With the Colville Tribes

Bonneville has marketed the power from Grand Coulee Dam since the dam began operations in 1942. Therefore, although Bonneville was not a named party to the Colville Tribes litigation, Bonneville understood that the power function—among the other, multiple functions of Grand Coulee—and its users (the Bonneville ratepayers) would likely be expected to bear a share of any judgment in the case. Together with the Department of Justice, Bonneville entered into discussions with the Colville Tribes to settle the Colville's lawsuit. The parties reached agreement in 1993, and legislation was passed in 1994 approving the settlement and directing payment of the settlement amounts to the Colville Tribes.

The settlement value was based largely on a formula that had been used to compensate the Flathead Indian Tribe when the Tribe's land was taken by a private entity for the development of Kerr Dam. It also included a litigation risk premium in recognition of the financial risk to the Government in proceeding to trial if the case did not settle. The settlement payments included two elements. First, the Colville Tribes in total were paid a lump sum of \$53 million from the Judgment Fund (a fund available to pay certain court judgments against the United States, and any Justice Department settlements of litigation) to compensate them for use of their land from 1942, when Grand Coulee began operations, to the time of settlement. Bonneville was not obligated to reimburse the Judgment Fund for any of this amount.

Second, Bonneville agreed to make annual payments to the Colville Tribes going forward. These payments represent a share of the revenue from the sale of the power from the dam. The first payment was for \$15.25 million for Fiscal Year 1995. Subsequent payments have been governed by a formula based on the annual value of power produced by Grand Coulee. Under the 1994 legislation enacting the settlement and a subsequent 1996 amendment, Bonneville receives an annual credit for its repayment to the Treasury that covers a portion of Bonneville's payment to the Colville Tribes. The credit was \$15.86 million in Fiscal Year 1997, and increased annually until Fiscal Year 2001, when it was \$18.55 million. Since Fiscal Year 2001 the credit has been fixed at \$4.6 million, and Bonneville will receive an annual credit of \$4.6 million as long as it continues making payments to the Colville Tribes. Therefore, the percentage of the Bonneville payment that the credit covers is changing through time. These credits, together with the amount paid by the Judgment Fund, achieve the contribution of the U.S. taxpayers to the settlement—30 percent of the settlement's value. Bonneville's ratepayers are contributing 70 percent of the value of approximately \$570 million.

Discussions With The Spokane Tribe

On August 4, 1994, the Senate Indian Affairs Committee and the Senate Energy and Natural Resources Committee held a joint hearing on S. 2259, a bill that endorsed the settlement agreement with the Colville Tribes. A representative of the Spokane Tribe testified at the hearing, seeking an amendment to the bill to address the Spokane Tribe's claims of damage from the project.

During full Senate consideration of the bill, which took place during the prior Administration, Senators Daniel Inouye, Bill Bradley, John McCain and Patty Murray engaged in a colloquy urging the Department of the Interior and other relevant Federal agencies to enter into negotiations with the Spokane Tribe to conclude a fair and equitable settlement of the Tribe's claims. On August 5, 1994, Interior Solicitor John Leshy wrote Senator Bill Bradley, indicating that the Department of the Interior was reviewing information submitted by the Spokane Tribe and would continue its examination. Subsequently, representatives of the Department of the Interior and the Spokane Tribe met on a number of occasions to discuss the Spokane Tribe's claims.

Bonneville then entered into discussions with the Spokane Tribe. In 1998 Bonneville representatives traveled to the Spokane Reservation to explain the formula used in the Colville Tribal settlement and how it might be applied to the Spokane Tribe's compensation request. In doing this, Bonneville recognized the Spokane Tribe's current and future contributions to the value of the project (from the continuing use of former Reservation lands), but, because of the absence of a claim and the lack of access to the Judgment Fund, indicated that it would not address any past contributions.

Since 1998 Bonneville and the Spokane Tribe have met a number of times to discuss appropriate compensation. Unfortunately, the two have been unable to reach agreement. In the end the Spokane Tribe was not satisfied with the going-forward payments that resulted when the formula used to compensate the Colville Tribes was applied, and was unhappy with the Administration's resistance to paying past damages.

On May 2, 2000, Bonneville Administrator Judi Johansen reiterated the prior Administration's position on compensation in a letter to Senator Murray. In the letter, Ms. Johansen underscored that the then Administration did not support payments for any past periods, but was prepared to discuss again the possibility of prospective annual payments of a share of Grand Coulee power revenues, based on the methodology employed in the Colville Tribes' settlement. She added that it would also be reasonable to discount these payments because, unlike the Colville Tribes, the Spokane Tribe had no legal claim. Finally, she stated that it was the Administration's position that, consistent with the cost-sharing arrangement between ratepayers and taxpayers adopted in the Colville Tribes legislation, 70 percent of the value of any compensation to the Tribe should come from Bonneville ratepayers and 30 percent from U.S. taxpayers.

If enacted, H.R. 1753 would compensate the Spokane Tribe at a level that appears to be substantially in excess of the amount that the prior Administration considered in previous negotiations. The bill would establish in the Treasury an interest-bearing account called the Spokane Tribe of Indians Settlement Fund Account. Section 5(b)(1) of the bill would require the Secretary of the Treasury to deposit into this account an amount equal to 39.4 percent of the lump sum paid to the Colville Tribes, adjusted for inflation, to compensate the Spokane Tribe for use of its land from June 29, 1940, to November 2, 1994.

The bill also would require the Administrator of the Bonneville Power Administration to make two series of payments. First, Section 5(b)(2) would require the Bonneville Administrator to deposit into the account each year for six years an amount equal to 7.88 percent of the total annual payments made to the Colville Tribes from 1996 (when the first annual payment was made to the Colville Tribes) through the end of the fiscal year during which H.R. 1753 is enacted, adjusted for inflation. Second, Section 5(c) of the bill would require the Bonneville Administrator to pay the Spokane Tribe on an annual basis, an amount equal to 39.4 percent of each annual payment that Bonneville is making to the Colville Tribes in fiscal years after the date of enactment of the Act.

Section 7 of the bill would require the Bonneville Administrator to deduct from interest payable each fiscal year to the Secretary of the Treasury, a percentage of each annual payment made to the Spokane Tribe for the preceding fiscal year. The percentage deducted would be calculated and adjusted to ensure that the Bonneville Power Administration receives a deduction comparable to the deduction it receives for payments made to the Colville Tribes under the Confederated Tribes of the Colville Reservation Grand Coulee Dam Settlement Act.

Finally, Section 9 of the bill would authorize an appropriation of such sums as are necessary to carry out the Act.

In contrast to the payments that would be provided the Spokane Tribe under H.R. 1753's provisions, Bonneville's estimate of going-forward payments to the Spokane Tribe—based on the methodology employed in the Colville Tribes settlement and taking into account the difference between the amount of acreage taken from the Colville Reservation and the amount taken from the Spokane Reservation—is about 19 percent of those provided to the Colville Tribes. During most of our discussions with the Spokane Tribe we have also assumed that this number should be discounted to reflect the lack of any claim filed under the ICC.

More Discussions With the Spokane Tribe

During the Bush Administration and Administrator Steve Wright's tenure, Bonneville continued discussions with the Spokane Tribe. Bonneville advanced a number of its own proposals to the Spokane Tribe that were outside the framework approved by the prior Administration in the hope that these proposals could bring prompt resolution of this issue. None of these proposals were embraced by the Spokane Tribe

as acceptable for settlement, and so Bonneville has not pursued approval of them in the present Administration. None of these proposals remain on the table. We advanced them in a spirit of reaching closure promptly. Bonneville did not advance them as proposals the Spokane Tribe could accept as a starting point and then build on to pursue additional compensation. Without agreement by all the Federal and non-Federal parties, the Administration is without a proposal for an appropriate settlement. The Administration is willing to resume working with the tribe to reach a fair settlement. At the appropriate time, the Administration would want to discuss the potential funding mechanisms.

Conclusion

Mr. Chairman, in closing I want to reiterate that the Bush Administration is supportive of reaching a fair and final settlement with the Spokane Tribe. I stand ready to answer any questions you may have.

[Mr. Hickok's response to questions submitted for the record follows:]

Response to questions submitted for the record by Steven Hickok, Deputy Administrator, Bonneville Power Administration, from Congressman Ken Calvert on H.R. 1753

Failed Negotiations

Q1. Why have negotiations between Bonneville and the Tribe failed?

A1. I believe there are three reasons that negotiations have not resulted in an agreement. First, Bonneville believes that any agreement with the Spokane Tribe should be based on the methodology employed in the Colville Tribes settlement. This methodology provides a principled basis for compensating the Spokane Tribe. The Tribe has not accepted the applicability of the Colville methodology.

Second, the lump sum that the Government paid to the Colville Tribes for past use of their lands was paid out of the Judgment Fund, in settlement of the Colvilles' lawsuit. Because the Spokane Tribe does not have a legal claim, the Judgment Fund is unavailable to pay the Spokane Tribe for past use of its land, and Bonneville has not been willing to make up any such amounts. Bonneville was not responsible for any part of the lump sum that was paid to the Colville Tribes, and it has been adamant in its refusal to assume this obligation with regard to the Spokane Tribe.

Third, the Spokane Tribe may view Bonneville's proposals as starting points from which the Tribe can build its pursuit of a larger compensation through legislation. H.R. 1753 appears to reflect this kind of strategy, as it adopts the Tribe's original position in negotiations from more than five years ago.

Middle Ground

Q2. Do you believe there is middle ground on this issue?

A2. H.R. 1753 represents the Spokane Tribe's original position in this negotiation, which is poles apart from BPA's. We will not find middle ground between these two positions if the Spokane Tribe believes it can expect to get H.R. 1753 passed in its current form.

Through the history of these negotiations, both parties have amended their positions at different points in the negotiations in search of "middle ground" that might support a fair solution. We will continue to try to find a compromise. BPA is committed to appropriate sharing of Grand Coulee revenues with the Spokane Tribe. We also will likely need the implementation assistance of Congress if and when we reach an agreement.

No Back Payments without Pending Claim

Q3. How has the Spokane Tribe's statute of limitations problems impacted the financial aspect of negotiations? Would this legislation set a precedent by which a back payment is given to a tribe that did not have a pending claim?

A3. As I testified, Bonneville has assumed that, because the Spokane Tribe has no legal claim, payments to the Tribe should be discounted. At one point Bonneville did advance an offer of annual payments with no discount. This offer was outside of the framework approved by the prior Administration, and was advanced in hope of bringing prompt resolution to this matter. It failed to do so.

In addition, because the Spokane Tribe does not have a legal claim, the Judgment Fund is unavailable to pay on any settlement. Therefore, the taxpayers' portion of any settlement payments to the Spokane Tribe would have to be provided through

other means. As I stated above, Bonneville has not been willing to assume any financial obligation for its ratepayers that it did not assume in the Colville Tribes settlement.

The question of possible precedent-setting potential of this legislation is best directed to the Justice Department. It is Bonneville's view that the Government compensated the Colville Tribes because a specific promise was made to the Tribes to pay them a share of the revenues of Grand Coulee Dam. The same promise was made to the Spokane Tribe.

Rate Impacts of the Legislation

Q4. How would you build this bill's costs into the BPA's rates? Has BPA heard from the customers on what this rate impact would have on them?

A4. Under the bill as presently drafted, Bonneville would make an initial payment of approximately \$20 million and annual payments of about \$20 million per year for the following 4 or 5 years. At that time the annual payment would decrease to approximately \$6-8 million (in today's dollars), and would be adjusted each year to reflect actual power sales from Grand Coulee Dam. Bonneville would build these payments into its rates as a power cost. The Fiscal Year 2004 payment would increase our wholesale priority firm rate by about one-half of one mill per kilowatt-hour (kwh). This would increase electricity bills by about 50 cents per month for an average-sized home (1,000 kwh per month) and about \$50,000 per month for an aluminum smelter (100,000 megawatt hours per month). While we have not discussed a potential Spokane settlement with our customers, customers have been quite clear that we need to take all actions possible to reduce the upward pressures on our rates.

Appropriate Time for Negotiations

Q5. Mr. Hickok, you mention that BPA would enter into new negotiations at an "appropriate time." When is an appropriate time?

A5. We are prepared to meet with the Spokane Tribe to renew these negotiations at any convenient time.

Mr. CALVERT. Mr. Raley, as you know, Secretary Norton has made wise water management a focus of her tenure. Do you believe that this settlement regarding H.R. 885 is consistent with the Secretary's 2025 water initiative?

Mr. RALEY. Yes, sir, in all respects. From the cooperative approach to its identification of canal lining and efficiency gains, this is one of the models that 2025 is based on.

Mr. CALVERT. The Arizona bill also has a unique and complex funding mechanism, as you mentioned in your testimony. Can you explain how that funding works now and how it would be changed under the bill?

Mr. RALEY. Mr. Chairman, at the present time, revenues from Arizona sources go into the Lower Basin Fund, which is not used or identified for anything in particular. This mechanism would create, in essence, a revolving fund where those revenues would be pledged as a permanent source of funding for the expenditures necessary to implement this legislation. That funding mechanism is what is being reviewed at the present time by the administration. A decision has not been made as to whether it is appropriate. I can say, though, that from the Department of Interior's standpoint, we are not aware of an alternative mechanism that provides the certainty that is required by the stipulation. We are open to finding whatever works.

Mr. CALVERT. How long do you think that will take?

Mr. RALEY. Mr. Chairman, I believe that the administration will need to be responsive to this Committee and this body's needs as you move this legislation forward, and that will help us reach closure on that issue.

Mr. CALVERT. I thank the gentleman.

Mrs. NAPOLITANO?

Mrs. NAPOLITANO. There are many questions that I would like to have. I still would love to hear more of the testimony from the witnesses before I ask the questions. Will you be around, Mr. Raley?

Mr. RALEY. Unfortunately, I have to leave, but we will certainly respond to written questions, or, Congresswoman, if you would like, I can try to schedule a time to come back up and meet with you and your staff this week or next week. I do want to talk about a certain study that you and I discussed on numerous occasions and would be happy to come up—

Mrs. NAPOLITANO. I was going to ask about that, but I was precluded.

Mr. RALEY. Well, I appreciate the Chairman keeping us focused, but we need to talk about that, as well, so I am sorry I can't stay.

Mrs. NAPOLITANO. Would you like a copy of it?

Mr. RALEY. Pardon?

Mrs. NAPOLITANO. Would you like a copy of it?

Mr. RALEY. Well, actually, I directed that it be sent out to the people that paid for it so they could review the draft, so I hope we have the same copy.

Mrs. NAPOLITANO. I trust. There is one question before you leave, then, and I will be in trust with you later, Mr. Chair, and I will share information with you for the record. How would the bill affect the repayment of the Central Arizona Project costs and the money that has been spent on non-Indian irrigation water distribution systems?

Mr. RALEY. As the Congresswoman is aware, there are aspects of the legislation that address 90 repayment. We believe that those aspects of the legislation are entirely appropriate, given that the allocation of water for the Central Arizona Project under this legislation is far different from what was originally intended under the Central Arizona Project. Simply put, it makes no sense to us, nor do we consider it to be fair, to have the prior 90 repayment structure continue even though the water is being allocated and used for other purposes.

Mrs. NAPOLITANO. That is very, very interesting to not have an idea of how that is going to happen.

The question then for Mr. Hickok would be, how soon can we expect BPA to get together with the tribe to resolve these outstanding issues and attempt to come to a settlement?

Mr. HICKOK. We would be prepared to start it at any time. There aren't any preconditions. And I think—

Mrs. NAPOLITANO. Are you scheduled now to continue meeting with them, I guess is my question.

Mr. HICKOK. We are not at the present time.

Mrs. NAPOLITANO. How soon would you be willing to meet with them?

Mr. HICKOK. We are ready at any time.

Mrs. NAPOLITANO. Thank you. Mr. Chair, I don't have questions right now.

Mr. CALVERT. I thank the gentlelady.

Mr. Hayworth?

Mr. HAYWORTH. Thank you, Mr. Chairman.

Assistant Secretary Raley, I touched on it in my opening statement, as did Vice Chairman Renzi and Senator Kyl, about the whole notion of inclusion of the San Carlos Tribe. If the bill is moved in its current form, in your opinion, is there sufficient flexibility to accommodate a settlement of the San Carlos Tribe?

Mr. RALEY. Yes, sir.

Mr. HAYWORTH. The absence in this bill of a settlement with the San Carlos Apache Tribe is a concern for us as well because of the many reasons you have articulated in the written testimony and as we have touched on earlier today. As Senator Kyl mentioned, and I think it bears repeating, we have a placeholder for water rights settlement for the San Carlos Apache Tribe. It is our understanding the negotiation toward a settlement are underway and the political and geographic position of the tribe is important toward final solutions toward water rights settlements on the Gila River.

From your perspective, can you delineate the efforts that are underway to move this toward resolution?

Mr. RALEY. Well, the Secretary's team has had numerous meetings with the interested parties and will continue to meet with them. It will be at increasing frequency and intensity because of the need to resolve these issues as this legislation proceeds. There were meetings in March and there is fairly constant communication. We are ready, willing, and able to engage at any time and commit to do so.

Mr. HAYWORTH. My friend, the Ranking Member, touched on the notion of funding as we look at H.R. 885, and on the record, Assistant Secretary Raley, do you agree with us that this bill needs a firm funding source to work?

Mr. RALEY. The stipulation entered for settlement of the litigation requires that there be a firm funding source, first. Second, from an equitable standpoint, the point that has been made in the past by the Gila River Indian Community is that paper water, or water that they can't use, is of ultimately no value to them. A foundational aspect to this settlement has been that it would provide the Gila River Community with actual ability to use the water they are accepting under this settlement. So from both a technical as well as an equitable standpoint, we recognize that if this concept is moved forward, there has to be a stable funding source.

Mr. HAYWORTH. As we look toward that stable funding source, in your opinion, will the fund be exhausted by the requirements of H.R. 885 prior to other tribes reaching water rights settlements, and if not, what part of the Lower Basin Development Fund would or could be available for use by other tribes, such as the White Mountain Apache, for future water development?

Mr. RALEY. As the Committee knows, the revenues into the fund are roughly \$40 to \$50 million a year. The actual outflow from the fund would be dependent upon the implementation of the construction schedule, so we cannot predict with precision exactly what the cash-flow would look like. We are comfortable that this bill could be implemented under that sort of a cash-flow arrangement.

We can't tell at this point what the total cost would be because of some of the open-ended aspects of the legislation, such funds as required, et cetera, et cetera. But we are comfortable that this ap-

proach, whether it is focused on this funding mechanism, if that were to be the will of Congress, or from a water standpoint, is fully consistent with the Secretary's trust responsibility to all of the tribes that are affected by this legislation.

Mr. HAYWORTH. I see my time is almost up. Just one question I think can be answered fairly quickly. If the administration did not settle these cases, what would the potential damages be to the Federal Government?

Mr. RALEY. The risk of litigation is very, very significant and it is very clear to the administration that settlement is in the best interests of the United States taxpayers, the United States citizens, and that litigation should be the last resort.

Mr. HAYWORTH. I thank you, Mr. Secretary, and thank you, Mr. Chairman.

Mr. CALVERT. I thank the gentleman.

Mr. Pearce?

Mr. PEARCE. Mr. Chairman, Assistant Secretary Raley, the 18,000 square feet that were made available to New Mexico by the 1968 bill. I am a little unfamiliar with it. Was that in the form of water moving down the stream or in the form of water that would potentially be stored? What form was that in?

Mr. RALEY. Well, there is a need for an exchange agreement to be worked out between the States and with Interior and we are committed to moving forward and working out that sort of exchange agreement. I believe originally that the contemplation was that there would be a dam constructed in New Mexico that would be used. That dam may not be the best—that particular site may not be the most feasible or most appropriate way, and the Department will be working with New Mexico to identify any structures that would be necessary as well as institutional arrangements for New Mexico to gain the benefits that were intended under the 1968 Act.

Mr. PEARCE. Mr. Raley, if the dam would not be the best possible solution, what potential solutions would you see and what recognition is there that every year that we don't have the 18,000 acre feet available is a loss of income, a loss of jobs, a loss of earning potential to people in that region?

Mr. RALEY. I think it would be premature for us to identify what would be the preferred course, which is why I can only commit to New Mexico that the Bureau of Reclamation and the other agencies within the Department of the Interior will work with New Mexico and, of necessity, with the other Colorado River Basin States to effectuate New Mexico's ability to gain the benefits of the 1968 Act. We are not prepared today to identify exactly how that should be implemented on the ground.

Mr. PEARCE. And, Mr. Raley, I don't think that there are provisions in this bill describing how that longstanding obligation since 1968 even will be resolved at this point. Do you foresee that that would be an addition to this bill? Would it be a supplemental bill? Would it—how do we move that forward? It has been one of the ongoing concerns of the Western side of our State.

Mr. RALEY. And legitimately so. We would leave to this body and the Senate exactly the form, whether it is an addition to this bill or a separate bill. We are, as I indicated, very hopeful and desirous

of the Arizona and New Mexico delegations reaching an accommodation on this issue so that the needs of both States can be met.

Mr. PEARCE. Thank you, Mr. Chairman. My last question would be that there is an outstanding need to settle an agreement between the Navajo Nation and New Mexico to provide water for Window Rock, and again, I wonder if there is any provision that you know of that is moving forward to create a conclusion to those needs?

Mr. RALEY. I am aware that within the Department, we have had a number of discussions on how to provide—to make that happen from an institutional or legal framework arrangement, and I know that is considerable interest and a focus within the New Mexico delegation, yourself and Senator Domenici and others to provide legislation that will give us direction on how to meet those needs.

Mr. CALVERT. I thank the gentleman.

Mr. Hickok, in your opinion, why have the negotiations between the Bonneville Power Administration and the tribe failed?

Mr. HICKOK. Mr. Chairman, it is probably because the Spokanes are encouraged to believe that whatever we might arrive at out there might simply be the starting point to do better back here. For example, H.R. 1753 adopts their negotiating position, the position they took at the beginning, which is poles apart from ours. So if they are encouraged to believe that they can actually obtain that, it probably wouldn't be worth anybody's time to continue negotiations.

But if, on the other hand, they were encouraged and we were encouraged to go out and find a fair and equitable settlement, recognizing that we should bring it back to you for its approval and to effect it, put it into effect, that would be a different dynamic.

Mr. CALVERT. Well, in your opinion, do you believe that you can find that middle ground? I asked that same question to Mr. Nethercutt. Do you have any encouragement at all for that?

Mr. HICKOK. I think we can. Yes, we can.

Mr. CALVERT. Mrs. Napolitano asked a question about when will these new negotiations begin, and you said any time, or whenever that is appropriate. Does everybody agree to that, both sides? I mean, are you willing to sit down immediately rather than we have to go through this legislative process?

Mr. HICKOK. We haven't discussed recently sitting down once again and moving—trying to move forward from positions we have taken in the past. I think the focus, frankly, has been to see whether this could be legislated to a resolution that they haven't been able to accomplish in negotiations.

Mr. CALVERT. Well, I would certainly encourage you to find that appropriate time and try to work this out. Obviously, we are very interested in possibly moving some legislation if, in fact, you are not able to negotiate this, and I think that is possibly consistent with this Committee. So I am hopeful that that can occur. We would much rather see negotiated settlements rather than legislated settlements. It is a much better solution to the problem.

With that, I am going to ask Mr. Hayworth to take over. I apologize to the Committee and I will recognize Mrs. Napolitano for additional questions.

Mrs. NAPOLITANO. Just one last question that I had and it had to do with the treaty with Mexico that you were referring to, Mr. Raley.

Mr. RALEY. I am sorry, could you repeat that? I didn't hear.

Mrs. NAPOLITANO. The treaty, the treaty with Mexico over water release. Are we in compliance in releasing that water?

Mr. RALEY. Yes, we are.

Mrs. NAPOLITANO. You are? Is this the same treaty that covers all the rivers that go into Mexico, or is it a separate treaty from the Colorado and the Rio Grande?

Mr. RALEY. No. Both the Rio Grande and the Colorado are covered by, or addressed in, the 1944 treaty.

Mrs. NAPOLITANO. Forty-four, so it is prior to 1968.

Mr. RALEY. Well, the treaty addresses both Rio Grande and the Colorado. The 1968, to my recollection, does not address issues in the Rio Grande.

Mrs. NAPOLITANO. OK.

Mr. RALEY. I hope—did I misunderstand your question?

Mrs. NAPOLITANO. No, no, you are right. I just wanted to clarify that. There is an issue of water shortages along the Rio Grande and I was wondering whether this is part of the same treaty.

Mr. HICKOK. I wanted to continue just a little bit further on the sitting at the table with Bonneville and whether or not you see that as being a peaceable solution at this point. Can you sit down with the group, with the tribe, and look at it from the perspective of moving forward and finding a solution, as the Chairman had indicated, without the benefit of legislative process?

Mr. HICKOK. I think that is the preferable way to go. I think that is what we would like to do. The negotiations we concluded with the Colvilles were not a piece of cake, but we were both smiling when we shook hands at the end of that. We reached a settlement that we believe was good for the government and good for the tribe, and we are prepared to do that with the Spokanes.

Mrs. NAPOLITANO. When was the last time you met with Bonneville, the tribes on this issue?

Mr. HICKOK. It was probably under the auspices of Congressman Nethercutt, who convened a meeting in January—January of last year.

Mrs. NAPOLITANO. So about a year and a half ago?

Mr. HICKOK. Yes.

Mrs. NAPOLITANO. And any attempts been made to renegotiate or sit down at the table since?

Mr. HICKOK. Not since.

Mrs. NAPOLITANO. Not since. Well, I look forward to talking to the tribes and finding out if they have the same willingness to sit at the table.

Mr. HICKOK. Thank you.

Mrs. NAPOLITANO. Thank you. Thank you, Mr. Chair.

Mr. HAYWORTH. [Presiding.] And we thank the Ranking Member as well as this panel of witnesses. Thank you very much for your time and your testimony.

Mr. HAYWORTH. And with that, I would like to recognize and call forward the third and final panel of witnesses who join us today in this hearing on these two bills.

The Subcommittee will welcome first Mr. Warren Seyler, Chairman of the Spokane Tribe of Indians; Governor Richard Narcia, who is Governor of the Gila River Indian Community; Ms. Vivian Juan-Saunders, who is the Chairwoman of the Tohono O'odham Nation; Mr. Joe Shirley is President of the Navajo Nation, and we understand that President Shirley, who was with us here yesterday, was unable to attend. Using the Chairman's prerogative, I understand that Legal Counsel for the Nation is here and the Subcommittee will make an exception to the rule and allow Legal Counsel for the Navajo Nation to offer testimony in the place of President Shirley Stanley Pollack, we understand will provide that testimony.

Also here joining us today to testify on H.R. 885 is Ms. Kathy Kitcheyan, who is the Tribal Chairwoman of the San Carlos Apache Tribe. We also welcome Mr. Herb Guenther, the Director of the Arizona Department of Water Resources, and Mr. Estevan R. Lopez, Director of the New Mexico Interstate Stream Commission.

We appreciate all the witnesses coming for this third panel this morning, and as we take care of all the logistics and make sure that literally all our witnesses have a place at the table and access to the microphones, again, we welcome you. Many of you have traveled great distances to be here today to discuss these two pieces of legislation.

And so now, as I believe name plates and microphones are in place, let us first recognize Chairman Seyler of the Spokane Tribe of Indians. Welcome, Mr. Chairman, and we would appreciate your testimony.

STATEMENT OF WARREN SEYLER, CHAIRMAN, SPOKANE TRIBE OF INDIANS

Mr. SEYLER. Thank you, Mr. Chairman and members of the Subcommittee on Water and Power, for the opportunity to testify on H.R. 1753. Accompanying me today is Howard Funke, our attorney, and Dr. Charles Pace, our economist. Also joining us is my Vice Chairman, Greg Abrahamson, and Tribal Council member Dave Wynecoop.

I am here today on behalf of the Spokane Tribe to ask for your help as representatives of the United States of America. I ask that you act on behalf of the United States to finally treat the Spokane Tribe fairly and honorably for the injury to our tribe and reservation caused by the Grand Coulee Project. My testimony today summarizes the critical need for this important legislation. We are also providing briefing books for the record and a video, if you allow them on the record, please.

Mr. HAYWORTH. Without objection, those will be submitted for the record.

Mr. SEYLER. The Spokane Tribe is an honorable tribe, a strong tribe, the tribe historically that has been a trusting tribe. We are good to our word and strong for this nation. Grand Coulee's waters flooded the lands of two sister Indian reservations that held great economic, cultural, and spiritual significance. Ours is one of those reservations.

Let me briefly say why I say sister reservations. The two reservations lie directly across from each other on the Columbia and Spokane Rivers. We have brothers and sisters that live on both reservations. We have brothers and sisters that are enrolled in both reservations. One sister may be Spokane, the other brother may be Colville. We have families that are joined. But yet this issue divides us. It is unfair.

Our life, culture, economy, and religion centered around the rivers. We were a river people. We were a fishing people. We depended heavily on the rivers and historic salmon runs that were brought to us. We are known by neighboring tribes as salmon eaters. The Spokane River, which was named after our people, was and is the center of our universe. We call it the "Path of Life." President Rutherford B. Hayes in 1881 recognized this importance and significance of the rivers to the Spokane Tribe and expressly included the entire adjacent river beds of the Spokane and Columbia Rivers within our reservation. But the Spokane and Columbia Rivers now are beneath the backwaters of the Grand Coulee Dam.

If I move forward, if I may, address the three issues that BPA listed were troublesome for them. First, they indicated that the method used in reaching settlement with the Colville Tribe. I don't think this was completely accurate. In speaking with the Colville Tribe and economists, and speaking with my good friend, Eddie Palmenteer, who was the Chairman of the Colville Tribe at that time, and I verified this just 2 or 3 days ago at a funeral of our former Chairman, he had said there were formulas, but that is not what the agreement was reached on.

He said they cut a money deal and cut it down the middle. Later, we feel that Bonneville went out, went back after this deal was cut, and then created a formula and made it work, so much so, that there was a litigation premium of 13 percent that was added. Why not 10 percent? Why not 15 percent? There was 13 so their formula could then work.

He also mentioned the ICCA Act of 1951. Understand that in the 1950s, our tribe was very remote. We were 100 miles away from the BIA office. All the communication was done in the form of letters. Yes, we didn't have a claim, but until 5 months before the 1951 deadline, we did not even have a formal government. Our constitution was still being worked on. We didn't have any method, really, to put our claims forward.

Our attorneys were not even hired until a few months before the end of the 1951 deadline. It was held up back here in D.C. in the Department of Interior in the Solicitor's Office. Back then, they had to approve who could be our attorneys. They held on to that approval until it was almost too late. We did get a land claim, but back then, we did not know we could file a claim on Coulee Dam. The Colvilles did not know they could file on Coulee Dam. Their claim did not come until, I believe it was in the 1970s, and they amended their claim.

And there were other issues that happened in 1967 when we did finally file our claim, issues that were held and were not given to the tribe. This, you can see in the report.

Also, they spoke about the rate issues, the 45 percent rate increase. The Spokane Tribe did not cause this rate increase. We still

receive nothing. All we do is give and give and give to this great nation. This is a great nation. We give our land. The government uses our land every year to create such a vast opportunity for this country to survive and to thrive. That dam in the 1940s helped win World War II. All we ask is to be paid to offer something for our contribution to helping do that.

Mr. HAYWORTH. Mr. Seyler, I wanted to intervene right now because, first of all, I just want to thank you for your testimony. We need to—and if I failed to mentioned this at the outset, forgive me—we are trying to get the brief comments in within a 5-minute parameter. If there is one final point you would like to make here, that would be great. And again, I will remind all assembled that your entire written testimony has been submitted for the record and we will take that into account. So let me respectfully ask you if you have one statement in summary.

Mr. SEYLER. Ninety seconds?

Mr. HAYWORTH. That would be fine, sir.

Mr. SEYLER. Back home, in my travels over these last 13 years, many times they ask what the people back home really feel. They feel we want to resolve this issue. They look back at the words that were spoken, and Acting Solicitor Ashton Brenner stated, “The government overlooked the prohibition against the guardian seizing the property of its own ward”—the tribe is that ward—and then profiting from that seizure.”

One other statement from Chief Justice Blackman. “Great nations, like great men, should honor their word.” This is what we are asking today, is that for the 70 years of promises and honor that this country, that we live up to that today. Thank you.

Mr. HAYWORTH. And we thank you, Mr. Seyler, for your statements.

[The prepared statement of Mr. Seyler follows:]

Statement of Warren Seyler, Chairman, Spokane Tribe of Indians

Thank you Mr. Chairman and members of the Subcommittee on Water and Power for the opportunity to testify on H.R. 1753. Accompanying me are Howard Funke, our attorney, and Dr. Charles Pace, our economist, who are available for questions and may have a few comments.

I am here today on behalf of the Spokane Tribe to ask for your help as representatives of the United States of America. I ask that you act on behalf of the United States to finally treat the Spokane Tribe fairly and honorably for the injury to our Tribe and Reservation caused by the Grand Coulee Project. My testimony today summarizes the critical need for this important legislation. We are also providing briefing books for the record which give greater detail on our issues.

Grand Coulee’s waters flooded the lands of two sister Indian reservations that held great economic, cultural and spiritual significance. Ours is one of those reservations.

Our life, culture, economy and religion centered around the rivers. We were river people. We were fishing people. We depended heavily on the rivers and the historic salmon runs they brought to us. We were known by our neighboring tribes as the Salmon Eaters. The Spokane River—which was named after our people—was and is the center of our world. We called it the “Path of Life.” President Rutherford B. Hayes in 1881 recognized the importance and significance of the rivers by expressly including the entire adjacent riverbeds of the Spokane and Columbia Rivers within our Reservation. But the Spokane and Columbia Rivers are now beneath Grand Coulee’s waters. Today our best lands and fishing sites lie at the bottom of Lake Roosevelt.

The other Reservation flooded by Grand Coulee’s waters is that of the Colville Confederated Tribes. The waters that rose behind Grand Coulee Dam brought similar fates to both our Reservations. Our burial sites—the places our ancestors were

laid to rest—were lost to the rising waters. The river banks, which provided us plants for foods and medicines were forever flooded. The homes, gardens, farms and ranches our people had worked hard to build on our Reservation are now under water. The free-flowing Columbia River and our “Path of Life” are now slack water behind Grand Coulee. The Dam also destroyed our salmon runs, which from time immemorial had given us life and identity. While the Colville lost most of their runs, salmon still were able to reach the Colville Reservation up to the Grand Coulee Dam. But upstream, at our Reservation, the salmon were entirely lost.

For decades, the Colville and Spokane Tribes shared similar histories and dialogue in connection with the Grand Coulee issue, and were subjected to the identical misconduct by the United States Government. When the project first began, it was to be a state project, governed by the Federal Power Act which required annual compensation to impacted Indian tribes. Later, after the Project was federalized and no longer fell under the Federal Power Act, Government officials continued to recognize that the Tribes should be compensated. When construction on Grand Coulee began, the Commissioner of Indian Affairs recommended, in writing, that both Tribes receive annual payments for the dam’s operations. The Secretary of the Interior and other high-level federal officials knew the Tribes should receive compensation. But it never happened. Both Tribes were equally deceived.

In 1941, our Tribes renewed their efforts, taking the extraordinary step of sending a joint delegation cross-country to meet in Washington, D.C., with the Commissioner of Indian Affairs on Grand Coulee. The meeting was held on December 10—three days after Pearl Harbor was bombed. The Commissioner and his staff explained that the war had become the nation’s priority, and that Congress could not be expected during such times to address the Tribe’s needs. But they committed to do what they could to help, and our leaders returned home trusting that things would be made right once the war was over—the same war we sent our young to fight.

These were times when our people were almost completely dependent on the Bureau of Indian Affairs for protecting our Reservation and resources. Our great white father was BIA. We were allowed to do nothing without the BIA. We were not experienced in the ways of American law, politics and business. At that time, we were among the most isolated of tribes in the nation. We were beginning to farm and ranch, but our subsistence ways—depending on the Rivers’ salmon—was most prominent. At that time, we also had no constitutionally formed government. And even though the Bureau of Indian Affairs’ nearest agency was 100 miles away on the Colville Reservation, we relied on BIA officials for managing details like recording the minutes of Tribal meetings. So when the Commissioner of Indian Affairs told our people he would do all he could to help, it carried great weight. Being a trusting people, we took the government representatives’ word.

Soon after the War’s end, in 1946, Congress enacted the Indian Claims Commission Act. The ICCA allowed Indian tribes to bring historic legal claims against the United States government. Several obstacles unique to our Tribe made the task of filing our ICCA claims unusually difficult. First, although the Act required the Commission and BIA to notify all tribes of claims that should be filed, we received no such notice. We learned of the ICCA from neighboring tribes only months before the 1951 filing deadline. Second, our leadership acted to retain a lawyer once they learned of the ICCA. But the Commissioner of Indian Affairs withheld his approval for several months, costing our Tribe much critical time. Also, our Constitutional government was first formed only 60 days before the 1951 deadline for filing. Eventually, the Spokanes filed a standard ICCA claim much like the claim filed by the Colville Tribes. No mention of Grand Coulee was made in either since the ICCA was understood to apply to historic claims rather than claims where wrongful conduct was ongoing.

In 1972, the Secretary of the Interior established a Task Force to address the Spokane and Colville Tribes’ Grand Coulee issues, and later, in 1976, the Senate Appropriations Committee renewed the hope of both Tribes by directing the Secretaries of the Interior and the Army to “open discussions with the Tribes to determine what, if any, interest the Tribes have in such production of power and to explore ways in which the Tribes might benefit from any interest so determined.” During the next several years, numerous meetings were held. Both the Colvilles and the Spokanes participated in earnest, fully believing that the Government would satisfy Congress’ directive. When the Task Force’s report came out, however, it was nothing more than a legal position: the United States has legal defenses and, therefore, there is no requirement to compensate the Tribes. After several years of work, the Report, which is included in our briefing materials, failed to consider the Tribal interests involved in the process. And it completely ignored Congress’ mandate that benefits associated with those interests be explored. We had trusted that Congress would help by addressing our claim side by side with the Colvilles.

As I said earlier, Grand Coulee's impacts on the Spokane and Colville Tribes was virtually identical, as were the Tribes' histories of dealing with the United States. While the Colvilles may have lost more land, the Spokane lost our salmon fisheries entirely. And both Tribes have survived decades of lost hope and broken promises.

There is a simple historical fact that separates the Colville and Spokane Tribes. It is that fact that led ultimately to the Colville Tribe's settlement of its claims—a settlement under which the Colvilles received \$53 million in back damages, and annual payments in perpetuity that since 1994 have been \$15-20 million each year.

We believe it is unprecedented for one tribe to receive compensation from the United States while a similar tribe receives nothing.

In the mid-1960s, the Spokane Tribe—a trusting tribe that has always come to the aid of the U.S.—entered a cooperative relationship with the United States government, and in 1967 the Tribe settled its Indian Claims Commission case. The Colvilles did not. Instead, the Colvilles persisted with their legal battles through the 1960s, and beyond the days of the Task Force. The Colvilles hadn't raised Grand Coulee claims in their original ICCA case any better than had the Spokanes. But their decades-long resistance to settlement enabled them to benefit from a mid-1970s Indian Claims Commission case. In 1975, the Commission ruled for the first time ever that it had jurisdiction over cases where the wrongful conduct continued beyond the ICCA's 1951 statutory deadline.

Armed with that new decision, the Colvilles by 1976 had sought and obtained permission to amend their ICCA claim to include for the first time their Grand Coulee case. Our Tribe, having come to terms with the United States in the 1960s, had no case left to amend. In spite of that, both tribes continued to negotiate and meet with the United States.

In 1978, the Indian Claims Commission ruled that the United States' conduct in building Grand Coulee Dam was unfair and dishonorable and, therefore, awarded the Colville Tribes over \$3 million for fisheries losses. In 1992, the Federal Circuit Court of Appeals ruled that the Colvilles' claim for power values, based on the same standard, was not barred. With that leverage, the Colvilles secured a settlement which, in 1994 the Congress approved in Public Law Number 103-436.

Nine years ago, in the context of the Colvilles' settlement, I came here and testified to Congress on my Tribe's behalf. I asked Congress to include our settlement with the Colvilles, or to waive the ICCA statute of limitations so we might be able to present our case. But rather than providing our requested relief, Congress again directed the United States to negotiate with us a fair settlement.

Since then, I have participated in virtually all discussions held between our Tribe and three BPA administrators representing the United States. During the past nine years, we have been forced to confront countless tactics that ran directly counter to the Congress' direction and intent that our Grand Coulee claims be negotiated in good faith and on the merits. As Senator Patty Murray stated:

"The fair and honorable dealings standard established in the Indian Claims Commission Act should clearly apply to the United States' conduct and relationship with both the Colville and Spokane Tribes."

For the first several years we met nothing but delay and the assertion of technical legal defenses. Members of Congress who had been made aware of these failings, admonished the United States, stating in clear terms that the negotiations must be on the merits of our claim without consideration of legal defenses, and that by definition, negotiations must involve flexibility. We were advised that an offer was being developed, but that it had to go through several levels of federal approval. We were concerned that there would be little room for negotiation. As we awaited the offer, we continuously sought and obtained assurances from BPA and others that once presented, there would be sufficient flexibility for negotiations. But when the offer finally came five years later, it was presented as an ultimatum—"Take it or leave it."

The offer fell far short of what we felt represented a fair settlement. Since 1992, we had sought a settlement that was proportionate to the Colvilles' based on lands used by the Project. So again we regrouped, and enlisted the assistance of Congressman Nethercutt to moderate a negotiation session with BPA. At the end of that session, both sides had made concessions, as occur during good faith negotiations. BPA committed to examining ways to make the agreement in principle work, and promised to get back to us in a couple of weeks. Then came more delay. After more than a year of waiting for BPA to follow through, we were stunned when BPA backed altogether away from the agreement in principle. Since then, we have tried numerous approaches on numerous occasions to make the agreement work—and each time BPA has rejected our efforts.

After nine years of fruitless negotiations, nine years of broken promises and delays, I am back here today requesting that this injustice not go unanswered. That

the United States Government recognize our contributions and sacrifices. To compensate one of the two Tribes devastated by Grand Coulee, and not the other has only compounded the injustice to our people and prolonged this conflict. We believe it would be unprecedented for Congress to only provide relief to one tribe—and not the other—when both are so similarly impacted.

In closing, Mr. Chairman, and honorable members of the Committee, I ask you to listen with your hearts. We have no place to turn. We have no place to go. We ask for our day of justice. We have waited for this day for over sixty years.

OCTOBER 20, 2003

Honorable Ken Calvert, Chairman
Subcommittee on Water and Power
U.S. House of Representatives
Committee on Resources
Washington, D.C., 20515

Dear Chairman Calvert:

Thank you for the opportunity to appear before the House Subcommittee on Water and Power's October 2, 2003 legislative hearings on H.R. 1753. The hearing was very important to the Spokane Tribe of Indians in our longstanding and continuing efforts to secure a fair and honorable settlement for tribal lands which were confiscated by the United States for purposes of the Grand Coulee Project.

In your letter of October 6, 2003, you indicated that the Majority Members of the Committee had five additional questions as follows:

1. Why have negotiations between Bonneville and the Tribe failed?
2. Do you believe there is middle ground on this issue?
3. Since Indian settlements are a national interest, are you opposed to having the U.S. Treasury fund all of the Spokane settlement?
4. The primary difference over the Colville and Spokane situation is the statute of limitations issue. Grand Coulee construction impacted your reservation before 1967, the year the Tribe settled on its original land claim. Why didn't the Tribe amend its original land claim to account for the Grand Coulee impacts?
5. Would this legislation set a precedent by which a back payment is given to a tribe that did not have a pending claim?

Please find attached my response to the above questions. Once again, thank you for holding hearings on H.R. 1753.

SINCERELY,

WARREN SEYLER, CHAIRMAN
SPOKANE TRIBE OF INDIANS
P.O. BOX 100
WELLPINIT, WA 99040

Attachment

Responses of Warren Seyler, Chairman, Spokane Tribe of Indians, to questions submitted for the record from Ken Calvert, Chairman, House Resources Subcommittee on Water and Power, regarding Spokane Settlement Bill, H.R. 1753—Submitted October 21, 2003

Question No. 1: Why have negotiations between Bonneville and the Tribe failed?

Response: There are three main reasons why negotiations between Bonneville and the Tribe have failed to produce a fair and honorable settlement. First, the Administration and BPA, despite repeated congressional directives, have consistently delayed and stalled progress. By doing so, BPA has deferred across two successive rate cases, without interest, on paying any compensation to the Tribe.

Second, during negotiations, BPA also insisted that any compensation package for the Spokane Tribe be based on a nonsensical formula that was never used as a basis for the Colville settlement and greatly disadvantages the Spokane Tribe.

Third, while delaying negotiations and devaluing the losses suffered by the Spokane Tribe, BPA was simultaneously distributing enormous additional benefits to aluminum companies and the other entities in the Pacific Northwest, far in excess

of the historic benefits which it has provided. This extreme increase in benefits was deliberately pursued in spite of the western energy crises and has led to unprecedented impacts on BPA's rates.

In 1994, while considering the Colville settlement, Congress directed the Administration to reach a fair and honorable settlement with Spokane. However, despite repeated letters from Congressman George Nethercutt, Senator John McCain and others urging the Departments of Justice and Interior to enter into negotiations with the Spokane Tribe and reach a fair and honorable settlement, the Administration stalled on its obligation and no negotiations occurred for four years, from 1994 through 1998.

Finally, in August of 1998, BPA began "discussions" with the Spokane Tribe but, even then, indicated that it had no authority to negotiate. In those discussions, BPA presented to the Spokane Tribe a formula which it proposed be used to value the lands which the United States seized from the Spokane Tribe for the Grand Coulee Project, claiming that this formula was the basis for the Colville settlement.

This formula was an improper and arbitrary application of an unrelated single FERC case, completely unlike Grand Coulee, and was totally unsuitable for valuing Spokane (or Colville) lands taken for the project and, more importantly, did not serve as a basis for the Colville Settlement. BPA, even though it lacked authority to negotiate, also demanded substantial additional concessions from the Spokane Tribe. For example, BPA insisted that any compensation paid the Spokane Tribe must not include payments for the fact that Grand Coulee exterminated the fish runs in the upper Columbia River and Spokane River which the Spokane people had depended upon since time immemorial.

As late as 1999, BPA still lacked authority to negotiate with the Spokane Tribe. As a result, Congressman George Nethercutt and Senator Patty Murray introduced Spokane settlement legislation. Those proposed settlement bills were based on straight-forward "proportional" settlement whereby the Spokane would receive 39.4% of the payments which the United States made to Colville. This proportion was based on the ratio of lands taken from the Spokane to lands taken from the Colville Tribe.

By March of 2000, BPA still had no authority to negotiate with the Spokane Tribe but made an "unofficial" proposal, again based on the "formula" BPA claimed it used in the Colville settlement. This proposal, which provided annual payments of just 19.2% of annual payments to Colville, contained numerous, significant mathematical errors and faulty analysis. It applied a "profitability method" to a non-profit organization. It viewed the Grand Coulee Project as a sort of "joint venture" between the United States and project developer and the Spokane Tribe as landowner. And, most importantly, it weighted a handful of acres in the project which the Spokane Tribe did not own at 2200 times the value of lands which the Spokane Tribe did own.

By May 2000, near the end of the 106th Congress, BPA had received authority to negotiate. The late release of authority to negotiate, the insistence on use of an unjust formula, the erroneous math and analysis provided by BPA to the Tribe delayed not only a fair negotiated settlement as directed by Congress but foreclosed meaningful consideration of the Spokane settlement bills by Congress.

In June 2001, the Spokane Tribe sought to revive negotiations with BPA by offering, at BPA's request, a range of creative approaches to settlement. These included a mix of less revenue in exchange for a block of power, upgrading of distribution/transmission facilities, assigning the Bureau of Reclamation (which operates the Grand Coulee Project) partial payment responsibility. The Spokane Tribe also indicated its willingness to structure payments for back damages over time to minimize any impacts on BPA's ratepayers.

In July of 2001, BPA flatly rejected the Spokane Tribe's proposal and, in response, withdrew its previous offer of a one-time back payment. In doing so, BPA cut the value of its prior best offer by approximately \$17 million. Thus, by August 2001, negotiations were at an impasse.

In September of 2001, the Spokane Tribe returned to Congress and requested settlement legislation be introduced. In response, Congressman George Nethercutt suggested that the Spokane Tribe make a final effort to negotiate and agreed to conduct and facilitate a negotiation session between the Tribe and BPA. Due to events which occurred in mid September, that session did not occur until January of 2002.

In January of 2002, Congressman Nethercutt facilitated a negotiations which arrived at a "middle ground" settlement scenario which provided compensation for back payments and annual payments of 29.4%, i.e., halfway between BPA's 19.2% and the Spokane Tribe's 39.4%. In those sessions, Steve Wright, BPA administrator, stated the middle ground settlement scenario should work for BPA but that he needed 10 days to 2 weeks to "run the numbers" and determine how best to structure the back payment over time.

By the first week in April of 2002, nearly three months after the session facilitated by Congressman Nethercutt, the Spokane Tribe had still heard no response from BPA. Out of total frustration, the Spokane returned to Washington, D.C., to request settlement legislation from Congress.

In May of 2002, four months after the January 2002 negotiating session and while in Washington, D.C., meeting with members of Congress, the Spokane Tribe finally received a reply from BPA regarding the “middle ground” settlement scenario. BPA’s delayed response merely put the back pay back on the table. BPA did not budge from its long-standing insistence that annual payments to the Spokane Tribe not exceed 19.2% of payments to Colville. BPA’s letter also warned the Tribe to promptly accept this offer or back pay would again be taken off the table.

As a result, the leadership of the Spokane Tribe concluded that further negotiations with BPA were unlikely to yield any kind of fair or honorable settlement. Rather, BPA merely used the January 14, 2002 facilitated negotiations to successfully stall reintroduction of settlement legislation and prevent timely congressional hearings.

In May, 2002, Congressman Nethercutt and Senator Patty Murray, for the second time, reintroduced Spokane settlement bill based on a 39.4% proportional settlement with the Colville. In July of 2002, staff for the Senate Committee staff of the Indian Affairs, Energy and staff acting on behalf of members of the Washington delegation suggested the Spokane Tribe attempt further negotiations with BPA, this time facilitated by and through the staff of the committees and requested the Tribe resubmit an expanded version of the creative areas/options for settlement to the Committee to serve as a basis for further settlement discussions.

At the time, BPA expressed renewed optimism and clarity stating that BPA staff would take a “first cut” at costing out the Tribe’s proposal and indicating that they would respond to Committee staff by August 1, 2002. August came and went with no reply by BPA. In fact, BPA did not respond until six weeks later and even then, in an email, merely stated that the Spokane Tribe’s proposal “simply increases costs to BPA” and “we have many obligations and requests for spending on worthy efforts.”

Thus, the Spokane Tribe renewed its request for congressional hearings in October 2002. However, congressional elections were hotly contested and no hearings were scheduled. Finally, in 2003, Congressman Nethercutt introduced a settlement bill in the House of Representatives and Senator Maria Cantwell introduced a settlement bill in the Senate. Hearings were held on October 2, 2003. At those hearings, BPA testified before the House Water and Power Subcommittee taking the position that the Tribe would be forced to accept its 19.2% offer if only Congress would stop encouraging the Tribe to expect more.

Question No. 2: Do you believe there is a middle ground on this issue?

Response: In a meeting hosted by Congressman Nethercutt in January 2002, the Spokane Tribe offered a “middle ground” proposal to BPA of 29.3% of the Colville Settlement. The 29.3% is the midpoint between BPA’s position of 19.2% and the Spokane Tribe’s position of 39.4%. BPA ultimately ignored the Tribe’s proposal.

Essentially, the Spokane Tribe had always bargained for 39.4% of the compensation package received by Colville. This proportion was based upon the ratio of the respective lands taken from the two tribes. However, BPA, applying its profitability-Kerr Dam methodology, was unwilling to offer more than 19.2% of annual payments made to Colville. And BPA’s last offer contained no “back pay” comparable to the \$53 million one-time payment to Colville.

With Representative Nethercutt’s assistance and guidance, the parties arrived on January 14, 2002 at a “middle ground” settlement scenario which (it was thought) could work for all parties. Following the January 14, 2002 meeting, the Tribe prepared a preliminary analysis of impacts of an annual payment—based on 29.3% of Colville—on BPA’s Power Business Line’s expenses and found they would be negligible. The increase in the average monthly electric bill of a typical household in the Pacific Northwest would be less than 12 cents, i.e., less than one-half of one percent of the rate increases BPA put in effect as of October, 2001 for the FY 2002-2006 rate case.

Near the end of the January 14, 2002 negotiations, Steve Wright, BPA Administrator and CEO, stated that the middle ground compromise, as outlined, should work for BPA but that he would need “ten days to two weeks” for BPA staff to “run the numbers” and determine how best to structure the back payment over time. The Tribe reiterated its willingness to partition the back payment into several separate payments in order to distribute the impact of the settlement over time, and its willingness to join with BPA in analyzing the impact on BPA ratepayers of various ap-

proaches for making the one-time payment. The BPA, however, virtually ignored the Tribe following the meeting.

Seventy-six (76) days later the Spokane Tribe had still not heard back from the Administrator. Two weeks had drawn out to nearly three months with no response on BPA's part. During that time, representatives of BPA had repeatedly indicated that their response was imminent. On April 3, 2002, the Chairman of the Spokane Tribe, Alfred Peone, contacted Representative Nethercutt, thanking him for his efforts and respectfully requesting that the settlement legislation be reintroduced and hearings scheduled regarding the Spokane Tribe's claims against the United States for damages associated with the Grand Coulee Project.

The Spokane Tribe's assessment was that further negotiations with BPA were unlikely to bear fruit and that reintroduction of settlement legislation and scheduling of congressional hearings was the best approach to resolving the Spokane Tribe's claims for damages and providing a fair settlement with the Spokane Tribe.

"At this point, we have lost faith in the value of further negotiations with Bonneville.... BPA throughout its dealings with the Spokane Tribe on this matter has...grossly undervalue[d] the contribution of Spokane lands seized by the United States for project purposes.... [T]his devaluation has taken many forms.... BPA has insisted on applying a profit-based methodology to a federal power marketing administration that earns no profits. BPA has insisted on using the lowest possible estimate of actual Spokane lands taken. It has insisted on imposing an arbitrary, capricious and wholly unwarranted litigation penalty in perpetuity on the Tribe to further reduce payments. Representatives of BPA have steadfastly refused to consider making a one-time back payment to Spokane comparable to the \$53 million which the Colville received in 1995, thereby undermining any semblance of a "proportional" settlement.

* * *

They requested that we develop but then refused to even discuss a creative approach to settlement, offered and then rescinded a proposal to provide the Tribe with a few years 'catch up' payment, and since January 14th failed to keep their promise as to when we could expect a response on strategies to structure a scenario for making payments over time."

Letter from Chairman Peone to Rep. Nethercutt, dated April 3, 2002.

In response to being totally ignored the Tribe again returned to Congress to request a legislated settlement. While meeting with members of Congress the Tribe received a belated written response from BPA in a letter from Steve Wright to Chairman Peone, dated May 15 2002—some seventeen weeks following the negotiation session. The Tribe left the January 14, 2002 session with the feeling an agreement had been reached subject to BPA "running the numbers." BPA had a different perspective. While apologizing for his "lengthy delay" in responding to the Tribe, Wright stated:

"I want to reiterate that while I expressed appreciation for your willingness to move from your earlier position, I did not in any way signify an agreement with your position. Our conversation was wide ranging and left many issues to be considered. Given that the current Administration has not been briefed on the issues we discussed, let alone any proposed settlement, I could in no way commit to any specific outcome."

Letter from Steve Wright to Alfred Peone, May 15, 2002.

Stating his continued support "for an agreement based on the Colville Settlement" the Administrator renewed the offer to the Tribe "of 19.2% of the total compensation paid the Colvilles." In effect this offer merely placed back into consideration the back pay of roughly \$17 million that was taken out of the offer on July 31, 2001 by BPA. The letter warned the Tribe that "Lacking prompt resolution, I will again withdraw the provision for payment for Fiscal Years 1995 through 2002." The only conclusion the Tribe could reach was that BPA used the January 14 negotiations to stall reintroduction of settlement legislation and hearings in Congress. BPA was ultimately successful.

Question No. 3: Since Indian settlements are a national interest, are you opposed to having the U.S. Treasury fund all of the Spokane settlement?

Response: No, so long as the payments are forthcoming, mandatory and certain. Indeed, the nation has realized enormous benefit from the use of Spokane lands to generate hydropower at Grand Coulee and so has the Pacific Northwest Region. While the Tribe does not care where the revenues come from to fund a fair and honorable settlement, the Tribe believes it would be simple to follow the Colville pay-

ment structure which in effect splits the costs of settlement between Bonneville and the U.S. Treasury.

The United States General Accounting Office (GAO) suggests splitting the costs between Treasury and Bonneville may be the preferred approach. The GAO provided testimony on October 2, 2003, to the Committee on Indian Affairs, U.S. Senate on the Spokane Settlement Bill, S. 1438, for the express purpose of addressing:

1. impact of a settlement on Bonneville if the costs were split between Bonneville and the Treasury; and
2. possible allocation of these costs between Bonneville and the Treasury.

GAO, *Testimony Before the Committee on Indian Affairs, U.S. Senate (October 2, 2003). (Attachment 1). Speaking to the issue of the allocation of payment responsibility among both the Treasury and Bonneville, GAO states:*

A reasonable case can be made for having Bonneville and the U.S. Treasury allocate any costs for the Spokane tribe's claims along the lines agreed to for the Colville tribes. Any settlement would attempt to re-institute a commitment the federal government made to the tribes in the 1930s. Under the Federal Water Power Act of 1920, licenses for the development of privately owned hydropower projects should include a "reasonable annual charge" for the use of Indian lands. Originally, the Grand Coulee site was licensed, and the Spokane tribe expected to receive annual payments for its lands used for the project. However, the license was cancelled when the federal government took over the project (federalized the project). Since the federal government is not subject to the Federal Water Power Act, it was not required to make annual payments to the tribes. Nevertheless, the federal government made a commitment in the 1930s to make annual payments to the Colville and Spokane tribes as if the project had remained a nonfederal project. However, the federal government did not follow through on this commitment after the project was completed and started generating revenues from electricity sales in the 1940s. In pursuing this matter, the tribes weathered various administrations and changes in the federal government's Indian policy. In the 1950s and 1960s, the federal government actively sought to terminate its relationship with a number of tribes, including the Spokane tribe.

In the early 1970s, when it became clear that the federal government was not going to make these payments, the Colville tribes were able to amend their claim with the Indian Claims Commission to pursue this matter. After agreeing to the overall legitimacy of the Colville tribes' claims, the Congress ultimately approved a settlement that primarily required Bonneville to provide annual payments for water power values. This settlement was a compromise to split the costs between Bonneville and the U.S. Treasury. Bonneville is primarily paying the recurring annual payments, and the U.S. Treasury's Judgment Fund provided the one-time lump sum payment in settlement of the past annual payments—\$53 million. The Spokane tribe, however, had already settled its claim years earlier and therefore could not file an amended claim with the commission. Nevertheless, since Bonneville collects the annual revenues for the electricity generated by the dam, it could be argued that Bonneville should make annual payments to the Spokane tribe out of those revenues, as it does for the Colville tribes; the U.S. Treasury would then pay a lump sum to settle any claims for past years. The current House settlement proposal, H.R. 1753, and previous House and Senate settlement proposals introduced in the 106th and 107th Congresses directed the settlement costs to be split between Bonneville and the U.S. Treasury.

It could also be argued that the U.S. Treasury should pay the Spokane tribe's claim, as it does for most claim settlements against the federal government. S. 1438 provides for the settlement of the tribe's claim from the U.S. Treasury. However, we do not believe a compelling case can be made to have the nation's taxpayers fully absorb an additional cost of doing business associated with Bonneville's production of power in one region of the country.

In summary, the Tribe is not opposed to the U.S. Treasury funding all of the Spokane payments. However, the Tribe believes it would be simple and equitable to split the costs between the Treasury and BPA along the lines of the Colville settlement.

[NOTE: Attachment 1—"Spokane Tribe's Additional Compensation Claim for the Grand Coulee Dam"—a statement submitted for the record by Robert A. Robinson,

Managing Director, Natural Resources and Environment, U.S. General Accounting Office, can be found at the end of this response to questions.]

Question No. 4: The primary difference over the Colville and the Spokane situations is the statute of limitations issue. Grand Coulee construction impacted your reservation before 1967, the year the Tribe settled on its original land claim. Why didn't the Tribe amend its original land claim to account for the Grand Coulee impacts?

Response: The Spokane Tribe of Indians did not amend its original petition to include Grand Coulee claims before the 1967 settlement for several reasons, including the failure of its trustee—the BIA—to advise the Tribe of its claims as required by statute, the continuous representation by its trustee that the Tribe's claims would be fairly and honorably addressed, and a 1975 development in ICCA case law that for the first time recognized the legal viability of ongoing claims that had not fully accrued before the ICCA statutory deadline.

In 1946, Congress enacted the Indian Claims Commission Act. Act of August 13, 1946 (60 Stat. 1049). Pursuant to that Act, there was a five year statute of limitations to file claims before the Commission which expired August 13, 1951. The ICC Act imposed a duty on the Bureau of Indian Affairs to apprise the various tribes of the provisions of the Act and the need to file claims before the Commission. 25 U.S.C. § 701 (repealed). Unfortunately, the BIA agency responsible for the Spokane Tribe was located 100 miles away on the Colville Indian Reservation. According to a 1981 memorandum to the Chairman of the Senate Appropriations Committee:

“There is no record of the Claims Commission or the Indian Bureau notifying or dealing with the Spokane Tribe in any way regarding its right to file claims before the Indian Claims Commission. During the Calvin Coolidge administration a bill had passed through Congress permitting it and the neighboring Kalispel Tribe to file claims for their ceded aboriginal lands, but that bill was vetoed by the president. That potential claim for the cession of its land was the only Claim that the Tribe had knowledge that it had.

At about the time of the approval of its tribal government in June 1951 the tribal leaders heard from their neighboring Kalispels and Coeur d'Alenes of their having filed claims for the cession of their aboriginal lands. They hastened back to Washington, D.C., and belatedly employed the same claims attorneys these tribes had. These just-hired attorneys had no time to investigate other claims and filed only one claim, that for the cession of their approximately 3.5 million acres of aboriginal land.”

See Memorandum of January 12, 1981 with Final Report, Colville/Spokane Task Force (September 1980). (Attachment 5 to Spokane Tribe of Indians' Written Materials submitted October 2, 2003). While the BIA was well aware of the potential claims of the Spokane Tribe to a portion of the hydropower revenues generated by Grand Coulee, there is no evidence that the BIA ever advised the Tribe of such claims. Thus, the Tribe had no way of knowing that its Grand Coulee claims should, or could, have been brought under the ICCA.

Although the Indian Claims Commission statute of limitations expired in August 1951, neither the Colville Confederated Tribes nor the Spokane Tribe knew then or for many years thereafter were aware that there would be a need to even file claims related to the use of their tribal land and water resources for the construction and operation of the Grand Coulee Dam for power production and reclamation. Instead, they were led by their federal trustee to believe that the United States would address their claims. Beginning in the 1930s and through the 1970s, the historical and legal record is replete with high level agency correspondence, Solicitor's Opinions, inter-agency proposals/memoranda, Congressional findings and directives and ongoing negotiations with the affected Tribes to come to agreements upon the share of revenue generated by Grand Coulee which should go to the Tribes for the use of their respective resources.

The Tribes had every reason to believe that its trustee, the United States, was, although belatedly, going to act in good faith to provide fair and honorable compensation to the Tribes for the United States' proportionate use of their Tribal resources for revenue generated by the Grand Coulee Dam. Thus, while the Spokane Tribe in 1967 settled the ICCA claims, the expectation of fair treatment for Grand Coulee's impacts continued. Ironically, the Spokane Tribe's willingness to resolve its differences with the United States would later be used as justification for the United States' refusal to deal fairly and honorably with the Tribe.

In addition to these points, no case law under the ICCA supported claims that had not fully accrued before 1951. Claims for wrongful conduct that began before 1951 and continued beyond that date were not recognized as legally viable until

nearly a decade after the Spokane Tribe's settlement. The Colvilles, who had not settled their ICCA claim, continued their litigation against the United States. In 1975, the Indian Claims Commission ruled for the first time ever on a jurisdictional question, left open since 1956, that controlled the Colvilles' Grand Coulee claim. The Commission held that it had jurisdiction over ongoing claims as long as they were part of a continuing wrong which began before the ICCA's enactment and continued thereafter. *Navajo Tribe v. United States*, 36 Ind. Cl. Comm. 433, 434-35 (1975). With this major legal question answered, the Colvilles sought, and in 1976 obtained, permission from the Commission to amend their complaint to include for the first time their Grand Coulee claims. With new life breathed into their claims, the Colvilles pursued litigation to the Federal Circuit Court of Appeals, which held that the ICCA's "fair and honorable dealings" standard may serve to defeat the United States' "navigational servitude" defense. *Colville Confederated Tribes v. United States*, 964 F.2d 1102 (Fed. Cir. 1992). In light of this ruling, the United States in earnest renewed negotiations with the Colvilles to resolve that Tribe's Grand Coulee-related claims. Unfortunately because the Spokane Tribe in 1967 had acted in cooperation with the United States to settle its ICCA case, it lacked the legal leverage to force meaningful negotiations.

Numerous historical occurrences factored into the different legal postures held under the ICCA by the Colville and Spokane Tribes. Key among them was the Spokane Tribe's inability to amend its original petition to include Grand Coulee-related claims. The Spokane Tribe was not advised by its federal trustee, as required by statute, of its potential ICCA claims related to Grand Coulee. The Tribe was misled by continuing representations by its federal trustee that the United States would fairly and honorably address its Grand Coulee claims. And, finally, no ICCA case recognized the Commission's jurisdiction over such ongoing claims until 1975, eight years after the Spokane Tribe's claims were settled.

Question No. 5: Would this legislation set a precedent by which a back payment is given to a tribe that did not have a pending claim?

Response: A complete answer to this question requires a four-part response.

First: The Spokane Indian Tribe's claim is so factually and legally unique that any precedential value of the legislation would be extremely limited.

Based on the Tribe's survey, there were only two other tribal governments who may have moral claims against the United States for lands inundated by federal dams in the Columbia Basin, but for the ICCA's statute of limitations. The Dworshak Dam on the North Fork of the Clearwater River barely touches upon the northern boundary of the Nez Perce Reservation, inundating a tiny portion of reservation lands. The American Falls Dam on the Snake River is located below the Fort Hall Indian Reservation. The reservoir behind the dam inundates a small portion of the Fort Hall Reservation, where the Snake River forms the northwestern boundary of the Fort Hall Reservation.

A third—the only other Indian Reservation in the United States that may have suffered similar devastation—is the Fort Berthold Reservation, which was flooded by a federal dam on the Missouri River. Unlike the Spokane, the Fort Berthold Tribes' culture was not centered around fishing. Moreover, Congress has already provided additional compensation to the Fort Berthold Tribes, over and above the substantial compensation these Tribes received when their lands were inundated, because of the especially egregious impacts. See Public Law 102-575.

None of these Reservations are impacted to the degree the Grand Coulee devastated the Spokane Reservation. The western (Columbia River) and southern (Spokane River) borders of the Spokane Reservation are flooded by the Grand Coulee Project. The Grand Coulee Project devastated the Spokane Reservation, and the Tribe's culture, far worse than any other Indian Reservation was impacted by federal hydro-electric development in the United States, except perhaps the Colville Reservation.

These comparisons go to the heart of the uniqueness of the Spokane claims. No other Northwest Indian reservations were devastated by a federal hydro-electric project as severely as the Colville and the Spokane. It is unique in that one inundated Tribe was compensated and the other is not, yet the impacts are identical. It is unique in that express, written commitments were made by the Secretary of the Interior to compensate the Tribes for Grand Coulee impacts, but these promises were not kept. The sheer size of the Grand Coulee Project (the largest electricity producer in the United States and the largest concrete dam in the world), combined with the absolute economic, social, cultural, and religious reliance of the Spokane Tribe on fishing and the Spokane and Columbia Rivers, makes its claims unique. The precedential value is, therefore, virtually non-existent.

Second: The Spokane Tribe's claim for the loss of its salmon runs may have created a precedent, and for that reason the Tribe agreed not to include it in this legislation.

Early in the negotiations that followed enactment of the Colville Tribe's settlement bill, the Spokane Tribe explained to the various involved federal agencies that it intended to pursue damages for the loss of its historic salmon runs. The Spokane Tribe, once totally dependent on the salmon, had lost these runs entirely to Grand Coulee. The Colville Tribes, which did not entirely lose access to the runs, were compensated for their losses through the ICCA.

When the first drafts of the Spokane Tribe's settlement bill were being discussed with potential Congressional sponsors, the Tribe was asked to remove provisions for compensation related to fish losses because they might establish a precedent. The remainder would be left in place because it was not viewed as precedent-setting. The Tribe agreed to the request.

Third: The legislation will not create a new precedent for similar claims, since there already exists ample legislative precedent for Congressional resolution of tribal claims against the United States notwithstanding technical defenses the United States could raise.

P.L. 103-436. The 1994 Colville Tribes Settlement Act is the most important precedent. The Colville and the Spokane are neighboring tribes situated across the Columbia River from one another. In 1994, Congress provided the Colville Tribes \$53 million back damages and an initial annual payment of \$15,250,000. Subsequent annual payments will be made to Colville as long as the Grand Coulee Dam generates hydroelectric power. The Spokane Tribe, suffering virtually identical in nature impacts, have received no such compensation from Congress.

P.L. 107-331. In 2002, the 107th Congress enacted the Yankton Sioux Tribe and Santee Sioux Tribe Equitable Compensation Act which provided a \$28 million trust fund as compensation to both Tribes for the taking of Reservation lands for the construction of the Fort Randall and Gavins Point Dams on the Missouri River system under the Pick-Sloan Project.

P.L. 106-511. In 2000, Congress enacted the Cheyenne River Sioux Equitable Compensation Act which provided a \$290 million trust fund as additional compensation to the Tribe for the taking of tribal lands for the Oahe Dam as part of the Pick-Sloan Project on the Missouri River.

P.L. 105-132. In 1997, in the first session of the 105th Congress, legislation was enacted to provide \$35 million of additional compensation to the Lower Brule Sioux Tribe of South Dakota for the takings of its lands for the Pick-Sloan Project.

P.L. 104-223. In 1996, the 104th Congress enacted legislation to provide compensation of \$27.5 million to the Crow Creek Sioux Tribe in South Dakota for infrastructure that was inundated by flood waters from two dams on the Missouri River. The "taking" legislation for the Pick-Sloan Project authorized under a 1944 Act of Congress provided for construction of alternative structures which were either not constructed or were constructed in a shoddy way. The method of compensation was premised on computation of revenues from the Western Area Power Administration (WAPA)—the same process used to fund the Three Affiliated Tribes and Standing Rock Sioux compensation bill (below).

P.L. 102-575. In 1992, Congress enacted the "Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Program Act," which provided compensation to both tribes for the taking of reservation lands for the construction of Garrison Dam and Reservoir and the Oahe Dam and Reservoir. Like Grand Coulee Project, these Missouri River dams were built without consultation and equitable compensation to the two impacted tribes, yet enormous benefits accrued to the United States and its designated beneficiaries.

The \$12 million in compensation each tribe had received for the taking of its lands at the time was found to be totally inadequate in light of the devastating and inordinate share of the impact borne by these two tribes. Congress appropriated an additional \$149.2 million for the Three Affiliated Tribes and \$90.6 million to the Standing Rock Sioux Tribe, which provides an annual revenue stream for both tribes based on the interest earned. (See Title 35 of Public Law 102-575 and Senate Report No. 102-267.)

P.L. 96-338. Restored lands to the Tule River Indian Tribe despite fact Tribe did not bring a claim for these lands under the ICCA.

P.L. 96-401. Authorizing the Secretary of the Interior to cancel and renegotiate coal leases involving Northern Cheyenne lands in light of an apparent violation of the Federal Government's fiduciary duty to the tribe and because the present "impasse can only lead to expensive and lengthy litigation." House Report No. 96-1370, at 3.

P.L. 95-280. The Zuni Act directed the Secretary of the Interior to purchase and hold certain lands in trust for the Zuni Indian Tribe of New Mexico. Notwithstanding statutes of limitations, the Act also conferred jurisdiction upon the Court of Claims to hear and determine the Zuni's aboriginal lands claim. Congress recognized that "[u]nfortunately, the Zuni Indian tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951." Congress took note of the fact that the Zuni lacked sufficient legal representation and that the federal government had failed to meet its obligation to provide notice and explanation to the Zuni of their right to file a claim against the United States.

Each of these enactments represent occasions when Congress provided compensatory or other direct relief to Indian tribes for past wrongs despite the absence of pending claims. As a consequence, the legislation will not stand as significant additional precedent.

Fourth: Pre-existing precedent also can be found, to a degree, in the various Congressional Bills of Reference or jurisdictional statutes, which allow Indian tribes to proceed with legal claims despite the running of statutes of limitations.

P.L. 104-198. Conferred jurisdiction on the United Court of Federal Claims with respect to land claims of the Pueblo of Isleta.

P.L. 95-280. The Zuni Act directed the Secretary of the Interior to purchase and hold certain lands in trust for the Zuni Indian Tribe of New Mexico. Notwithstanding statutes of limitations, the Act also conferred jurisdiction upon the Court of Claims to hear and determine the Zuni's aboriginal lands claim. Congress recognized that "[u]nfortunately, the Zuni Indian tribal leadership failed to comprehend the absolute necessity of filing a claim during the statutory five-year period ending in 1951." Congress took note of the fact that the Zuni lacked sufficient legal representation and that the federal government had failed to meet its obligation to provide notice and explanation to the Zuni of their right to file a claim against the United States.

P.L. 95-247. Notwithstanding certain statutes of limitations, Congress conferred jurisdiction on the Indian Claims Commission to consider the merits of the Wichita Indian Tribe's claim against the United States for the taking of lands.

P.L. 95-243. This Act authorized the U.S. Court of Claims to review, without regard to the technical defenses of *res judicata* or collateral estoppel, the Sioux Tribe's claims for compensation for the taking of the Black Hills. Thus Congress overrode the Court of Claims dismissal of the Sioux's claim, which had been dismissed on the grounds of *res judicata*.

P.L. 96-251. Waived the statute of limitations of the ICCA to permit the Cow Creek Band of Umpqua Indians to file a claim against the United States for treaty violations. Congress stated that its enactment of this legislation "will assure the Cow Creek Ban their right to due process and a fair day in court." Senate Report No. 96-397 at 2.

P.L. 96-404. Allowed a land claim suit by the Three Affiliated Tribes to proceed in the U.S. Court of Claims notwithstanding statutes of limitations, lapse in time, *res judicata*, collateral estoppel, or any other provisions of law.

P.L. 96-405. Authorized the U.S. Court of Claims to hear claims by the Blackfeet and Gros Ventre Tribes for land takings notwithstanding Court of Claims earlier dismissal of these tribes' suit on the grounds of *res judicata*.

P.L. 96-434. Same relief as in P.L. 96-405 afforded to the Assiniboine Tribe.

Thus, this legislation is not precedentially unique since Congress often has provided mechanisms that enable Indian tribes to seek compensation for past wrongs.¹

The enactment of legislation to allow the Spokane Tribe to litigate its claims, like those listed above, is a potentially available alternative that was considered and rejected by the Tribe and by one of the bill's primary sponsors. Such actions almost unanimously result in the expenditure by both sides of vast sums on lawyers and expert witnesses, take years to resolve, are exceedingly contentious, and rarely are resolved in a manner satisfactory to all parties. As experienced lawyers often say, a bad settlement is always better than a good judgment.

¹ See also, footnote 12, GAO, Testimony Before the Committee on Indian Affairs, U.S. Senate (October 2, 2003) (listing various additional public laws similar to those above).

ATTACHMENT 1

Testimony before the Committee on Indian Affairs, U.S. Senate, Statement submitted for the record by Robert A. Robinson, Managing Director, Natural Resources and Environment, U.S. General Accounting Office

Mr. Chairman and Members of the Committee:

We are pleased to have the opportunity to comment on the Spokane tribe's additional compensation claim for the Grand Coulee Dam and the proposed legislative settlement, S. 1438. As you know, the Grand Coulee Dam was constructed on the Columbia River in northeastern Washington State from 1933 to 1942. When finished, the 550-foot high dam was the largest concrete dam in the world. It is still the largest hydroelectric facility in the United States. The Franklin D. Roosevelt Reservoir, which was created behind the dam, extends over 130 miles up the Columbia River and about 30 miles east along the Spokane River. The reservoir covers land on the Colville Reservation along the Columbia River and land on the adjacent Spokane Reservation along both the Columbia and Spokane rivers. Under a 1940 act, the federal government paid \$63,000 and \$4,700 to the Colville and Spokane tribes, respectively, for the land used for the dam and reservoir.¹

Subsequently, the Colville tribes pursued additional claims for their lost fisheries and for "water power values" (i.e., a share of the hydropower revenues generated by the dam from the use of their lands) before the Indian Claims Commission. The Colville tribes' fisheries claim was settled in 1978 for about \$3.3 million. Under a 1994 Act—the Confederated tribes of the Colville Reservation Grand Coulee Dam Settlement Act (P.L. 103-436, Nov. 2, 1994)—the Colville tribes were awarded a lump sum payment of \$53 million for lost hydropower revenues and, beginning in 1996, annual payments that have ranged between \$14 million and \$21 million for their water power values claim.² The lump sum payment was made from the U.S. Treasury, and the cost of the annual payments is shared between the Bonneville Power Administration (Bonneville), which markets the power generated at the dam, and Treasury.

The Spokane tribe is currently pursuing similar claims. S. 1438, introduced in July 2003, is a proposed legislative settlement for the Spokane tribe's claims. While settlement proposals introduced in the 106th and 107th Congresses directed the settlement costs to be split between Bonneville and the U.S. Treasury, S. 1438 provides that the settlement be paid entirely out of the U.S. Treasury.³ In this context, you asked us to address the (1) impact of a settlement on Bonneville if the costs were split between Bonneville and the U.S. Treasury; and (2) possible allocation of settlement costs between Bonneville and the U.S. Treasury. To meet these objectives, we relied on information developed for a preliminary GAO report to the Subcommittee on Energy and Water Development, House Committee on Appropriations;⁴ interviewed officials at Bonneville and representatives of the Spokane tribe; and reviewed numerous documents on the Colville and Spokane tribes' claims for additional compensation. Our work for the Appropriations Subcommittee on Bonneville's financial condition is continuing. We plan to issue our final report in June 2004. Also, as you know, we are continuing our review of Bonneville's obligations for tribal fish and wildlife programs for this Committee. See appendix I for a more detailed description of how we estimated the impact of a settlement on Bonneville. We performed our work in September 2003, according to generally accepted government auditing standards. We provided a draft of this statement to Bonneville for comment but did not receive a response in time to include in this statement.

In summary, we found the following:

- A settlement with the Spokane tribe along the lines provided to the Colville tribes would likely necessitate a small increase in Bonneville's rates for power. While the rate increase would amount to less than 20 cents per month per

¹Pub. L. No. 76-690, 54 Stat. 703 (1940), an act for the acquisition of Indian lands for the Grand Coulee Dam and Reservoir, and for other purposes, granted the United States title to Indian lands the Secretary of the Interior designated as necessary for the Grand Coulee Dam project and authorized the Secretary to determine the appropriate amount to be paid to the tribes for lands so designated.

²Pub. L. No. 103-436, 108 Stat. 4577 (1994).

³The legislative settlement proposals introduced in the 106th Congress were S. 1525 and H.R. 2664. In the 107th Congress, the proposals were S. 2567 and H.R. 4859. The proposals pending in the 108th Congress are S. 1438 and H.R. 1753. Under S. 1438 the settlement costs would all be paid out of the U.S. Treasury, while under H.R. 1753, the settlement costs would be split between Bonneville and the Treasury.

⁴U.S. General Accounting Office, Bonneville Power Administration: Long-Term Fiscal Challenges, GAO-03-918R (Washington, D.C.: July 1, 2003).

household, it comes at a time when Bonneville's customers have already absorbed rate increases, including those announced on October 1, 2003, of over 40 percent and when the region's economy is experiencing difficulties. However, the bulk of Bonneville's obligations in any settlement similar to the Colville settlement will occur in the future, when the conditions causing Bonneville's current financial difficulties will probably have abated. Therefore, Bonneville's current financial difficulties should not unduly influence current discussions about how to compensate the Spokane tribe.

- A reasonable case can be made to settle the Spokane tribe's case along the lines of the Colville settlement—a one-time payment from the U.S. Treasury for past lost payments for water power values and annual payments primarily from Bonneville. Bonneville continues to earn revenues from the Spokane Reservation lands used to generate hydropower. However, unlike the Colville tribes, the Spokane tribe does not benefit from these revenues. The Spokane tribe does not benefit because it missed its filing opportunity before the Indian Claims Commission. At that time it was pursuing other avenues to win payments for the value of its land for hydropower. These efforts would ultimately fail. Without congressional action, it seems unlikely that a settlement for the Spokane tribe will occur.

Background

The Colville and Spokane Indian reservations were established in 1872 and 1877, respectively, on land that was later included in the State of Washington. The Colville Reservation, of approximately 1.4 million acres, was created on July 2, 1872, through an executive order issued by President Grant. The Spokane Reservation, of approximately 155,000 acres, was created by an agreement between agents of the federal government and certain Spokane chiefs on August 18, 1877. President Hayes' executive order of January 18, 1881, confirmed the 1877 agreement. In 2001, the Colville and Spokane tribes had enrolled populations of 8,842 and 2,305, respectively.

The Indian Claim Commission was created on August 13, 1946, to adjudicate Indian claims, including "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."⁵ Under section 12 of the Act that created the Commission, all claims had to be filed within 5 years. Ultimately 370 petitions, which were eventually separated into 617 dockets, were filed with the Commission. The great majority of the claims were land claims. Settlements awards were paid out of the U.S. Treasury.

The Colville tribes filed a number of claims with the Indian Claims Commission within the 5-year window—on July 31, August 1, and August 8, 1951. Their fisheries claim and water power values claim became part of Indian Claims Commission Docket No. 181, which was originally filed on July 31, 1951. The original petition for Docket No. 181 included broad language seeking damages for unlawful trespass on reservation lands and for compensation or other benefits from the use of the tribes' land and other property. The tribes' original petition did not specifically mention the Grand Coulee Dam. In 1956, Docket No. 181 was divided into four separate claims. The tribes' fisheries claim became part of Docket No. 181-C. In November 1976, over 25 years after the original filing of Docket No. 181, the Indian Claims Commission allowed the Colville tribes to file an amended petition seeking just and equitable compensation for the water power values of certain riverbed and upstream lands that had been taken by the United States as part of the Grand Coulee Dam development. This amended water power value claim was designated as Docket No. 181-D, and it was settled in 1994 by Public Law 103-436.

The Spokane tribe filed one claim with the Indian Claims Commission, Docket No. 331, on August 10, 1951, just days before the August 13, 1951, deadline. The claim sought additional compensation for land ceded to the United States by an agreement of March 18, 1887. Furthermore, the Spokane tribe asserted a general accounting claim. These two claims were separated into Docket No. 331 for the land claim and Docket No. 331-A for the accounting claim. Both claims were jointly settled in 1967 for \$6.7 million. That is, the Spokane tribe settled all of its claims before the Indian Claims Commission almost 10 years before the Colville tribes were allowed to amend their claim to include a water power values claim. In doing so, the Spokane tribe missed its opportunity to make a legal claim with the Indian Claims Commission for its water power values as well as its fisheries. At that time, the Spokane tribe, as well as the Colville tribes, were pursuing other avenues for compensation of water power values.

⁵Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050 (1946).

The Bonneville Power Administration was formed in 1937 to market electric power produced by the Bonneville Dam.⁶ Bonneville's marketing responsibilities have expanded since then to include power from 31 federally owned hydroelectric projects, including the Grand Coulee Dam. Under the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act), Bonneville is responsible for providing the Pacific Northwest with an adequate, efficient, economical, and reliable power supply.⁷ Bonneville currently provides about 45 percent of all electric power consumed in Idaho, Montana, Oregon, and Washington and owns about 75 percent of the region's transmission lines.

Bonneville Would Have to Recover Settlement Costs from Ratepayers, but Magnitude of Rate Increase Would Be Small

A settlement requiring Bonneville to pay the Spokane tribe would add to its costs of operation, and it therefore would probably pass these costs to Bonneville's customers in the form of higher rates for power. Bonneville is a self-financing agency, which means that it must cover its costs through the revenue generated by selling power and transmission services. Bonneville typically sets its rates for 5-year periods in order to generate enough revenue to cover the costs of operating the federal power system and to make its debt payments.

Assuming that the settlement with the Spokane tribe is similar in nature to the settlement with the Colville tribe in 1994, the impact on Bonneville's rates would be small. Under the settlement with the Colville tribe, Bonneville has made annual payments since 1996 that have ranged from about \$14 million to \$21 million. Currently, Bonneville estimates that it will pay about \$17 million per year over the next 5 years.⁸ In its negotiations with Bonneville, the Spokane tribe has asked for about 40 percent of the Colville tribe's settlement, which would amount to about \$7 million annually from Bonneville. Bonneville uses a rule of thumb to determine rate increases: between \$40 million and \$50 million in additional annual costs will lead to a rate increase of 1/10th of a cent per kilowatt hour (kWh). Using this rule, we estimate that a settlement with Spokane that is equivalent to 40 percent of the Colville settlement would lead to an increase in rates of less than 20 cents per month per household for a typical household relying solely on power from Bonneville, or a 0.5 percent increase in rates over current levels.⁹

Although the magnitude of the rate increase necessary to fund a settlement with the Spokane tribe would be small, it comes at a time when Bonneville's customers have recently faced large rate increases. From 2000 through early 2003, Bonneville experienced a substantial deterioration in its financial condition because of rising costs and lower-than-projected revenues. As a result, Bonneville's cash reserves of \$811 million at the end of Fiscal Year 2000 had fallen to \$188 million by the end of Fiscal Year 2002. To cope with its financial difficulties, Bonneville raised its power rates for 2002 by more than 40 percent over 2001 levels. On October 1, 2003, Bonneville raised its rates a further 2.2 percent. Despite Bonneville's current financial difficulties, Bonneville predicts the conditions that led to the financial problems—namely, consecutive years of low water conditions, extreme market price volatility, and long-term contracts Bonneville signed to buy power from other suppliers at a high cost, which are due to expire in 2006—will abate. Therefore, because the bulk of Bonneville's obligations in any settlement similar to the Colville settlement will occur in the future, Bonneville's current financial difficulties should not unduly influence current discussions about how to compensate the Spokane tribe.

A Reasonable Case Can Be Made for Adopting the Colville Model in Allocating Any Costs Associated with a Settlement for the Spokane Tribe

A reasonable case can be made for having Bonneville and the U.S. Treasury allocate any costs for the Spokane tribe's claims along the lines agreed to for the Colville tribes. Any settlement would attempt to re-institute a commitment the federal government made to the tribes in the 1930s. Under the Federal Water Power Act of 1920, licenses for the development of privately owned hydropower projects

⁶Pub. L. No. 75-329, § 2, 50 Stat. 731, 732 (1937).

⁷Pub. L. No. 96-501, § 2, 94 Stat. 2697 (1980).

⁸The payments are to be made in perpetuity, but Bonneville gave us an annual estimate for the next five years that conforms to its 5-year rate case planning horizon. While Bonneville will make these payments to the Colville tribes, it will receive interest credits in the amount of \$4.6 million per year from the U.S. Treasury—also in perpetuity—effectively reducing its payments by about 27 percent.

⁹This estimate also assumes that Bonneville pays the entire \$7 million per year. If Bonneville receives interest credits from Treasury for part of the amount, the impact would be proportionally smaller.

should include a “reasonable annual charge” for the use of Indian lands.¹⁰ Originally, the Grand Coulee site was licensed, and the Spokane tribe expected to receive annual payments for its lands used for the project. However, the license was cancelled when the federal government took over the project (federalized the project). Since the federal government is not subject to the Federal Water Power Act, it was not required to make annual payments to the tribes. Nevertheless, the federal government made a commitment in the 1930s to make annual payments to the Colville and Spokane tribes as if the project had remained a nonfederal project. However, the federal government did not follow through on this commitment after the project was completed and started generating revenues from electricity sales in the 1940s. In pursuing this matter, the tribes weathered various administrations and changes in the federal government’s Indian policy. In the 1950s and 1960s, the federal government actively sought to terminate its relationship with a number of tribes, including the Spokane tribe.

In the early 1970s, when it became clear that the federal government was not going to make these payments, the Colville tribes were able to amend their claim with the Indian Claims Commission to pursue this matter. After agreeing to the overall legitimacy of the Colville tribes’ claims, the Congress ultimately approved a settlement that primarily required Bonneville to provide annual payments for water power values. This settlement was a compromise to split the costs between Bonneville and the U.S. Treasury. Bonneville is primarily paying the recurring annual payments, and the U.S. Treasury’s Judgment Fund provided the one-time lump sum payment in settlement of the past annual payments—\$53 million.¹¹ The Spokane tribe, however, had already settled its claim years earlier and therefore could not file an amended claim with the commission. Nevertheless, since Bonneville collects the annual revenues for the electricity generated by the dam, it could be argued that Bonneville should make annual payments to the Spokane tribe out of those revenues, as it does for the Colville tribes; the U.S. Treasury would then pay a lump sum to settle any claims for past years. The current House settlement proposal, H.R. 1753, and previous House and Senate settlement proposals introduced in the 106th and 107th Congresses directed the settlement costs to be split between Bonneville and the U.S. Treasury.

It could also be argued that the U.S. Treasury should pay the Spokane tribe’s claim, as it does for most claim settlements against the federal government. S. 1438 provides for the settlement of the tribe’s claim from the U.S. Treasury. However, we do not believe a compelling case can be made to have the nation’s taxpayers fully absorb an additional cost of doing business associated with Bonneville’s production of power in one region of the country.

Conclusion

In conclusion, since the Spokane tribe missed its opportunity to file claims with the Indian Claims Commission for its fisheries and water power values, it is unlikely that the tribe’s claims and any associated settlement or final resolution will move forward in any meaningful way without some form of congressional intervention. If the Congress is satisfied with the merits of the tribe’s claims, settlement legislation, such as the current House and Senate bills, could be used as a method to resolve the tribe’s claims. A reasonable case can be made for adopting the model established in the Colville settlement to allocate the settlement costs between Bonneville and the U.S. Treasury. Another option would be to enact legislation providing for some form of dispute resolution, such as mediation or binding arbitration. If the Congress has any doubts about the merits of the claim, it could enact legislation to allow the tribe to file its claim in the U.S. Federal Court of Claims.¹² The merits of the claims could then be decided in court. Such an action was discussed in 1994 when the Colville settlement was reached.

Contacts and Acknowledgments

For further information, please contact Robert A. Robinson on (202) 512-3841. Individuals making key contributions to this testimony included Jill Berman, Brad Dobbins, Samantha Gross, Jason Holliday, Jeffery Malcolm, Frank Rusco, Rebecca Sandulli, and Carol Herrnstadt Shulman. Appendix I

¹⁰ Pub. L. No. 66-280, § 10(e), 41 Stat. 1063, 1069 (1920).

¹¹ The Judgment Fund is a permanent indefinite appropriation available to pay certain settlements and judgments against the federal government.

¹² See, e.g., Pub. L. No. 95-280, § 2, 92 Stat. 244 (1978), Pub. L. No. 96-251, 94 Stat. 372 (1980), Pub. L. No. 96-404, 94 Stat. 1711 (1980), or Pub. L. No. 104-198, 110 Stat. 2418 (1996).

Methodology for Estimating the Impact of a Settlement on the Bonneville Power Administration

Because a settlement has not yet been negotiated, we used the terms of the Colville settlement to estimate the potential effect of the Spokane settlement on electricity rates in the Pacific Northwest. Assumptions used in this calculation are designed to provide a conservative (high-end) estimate of the impact of the settlement on Bonneville's ratepayers. For planning purposes, Bonneville estimates that payments to the Colville tribes total \$17 million annually.¹³ The Spokane tribe is requesting as much as 40 percent of the Colville settlement, or approximately \$7 million annually. To estimate the impact of increasing costs on power rates, Bonneville uses a rule of thumb that \$40 million to \$50 million in increased costs over a year necessitate a rate increase of approximately \$0.001 per kilowatt-hour (kWh). Using this rule of thumb, a \$7 million per year cost increase would raise Bonneville's wholesale power rates by approximately \$0.00016 per kWh.

According to the Oregon Department of Energy, the average household in Oregon uses approximately 1,000 kWh of electricity per month. An average household in Washington uses 1,170 kWh of electricity per month, according to the Washington Utilities and Transportation Commission. Using the approximate rate increase calculated above, the electricity bills for average households in Oregon and Washington would increase approximately 16 cents and 19 cents, respectively. These calculations assume that the household receives all its electricity from Bonneville and that its retail utility passes through the wholesale rate increase. The impact on the region as a whole would be smaller because Bonneville provides only about 45 percent of the region's power. Our calculations also assume that Bonneville would not be permitted to deduct any portion of its payment to the Spokane tribe from its debt payment to the U.S. Treasury. Public Law 103-436 enables Bonneville to deduct a portion of its annual payment to the Colville tribes as an interest credit on its Treasury debt payments. If a similar provision were included for any payments for the Spokane tribe, the impact on ratepayers would be reduced.

Mr. HAYWORTH. Now, as we consider H.R. 885, it is my privilege again to recognize Governor Narcia for his testimony on H.R. 885. Governor Narcia?

STATEMENT OF RICHARD NARCIA, GOVERNOR, GILA RIVER INDIAN RESERVATION, ACCOMPANIED BY RODNEY B. LEWIS, GENERAL COUNSEL, GILA RIVER INDIAN COMMUNITY

Mr. NARCIA. Thank you, Mr. Chair. Chairman Calvert, Vice Chairman Renzi, and members of the Subcommittee on Water and Power, I am Richard Narcia, Governor of the Gila River Indian Community, and I appreciate this opportunity to share with you the Community's strong support for the Arizona Water Settlement Act. I also take this opportunity to thank you, Representative Hayworth, for your hard work and leadership in sponsoring this important legislation. I also thank you, Senator Kyl, for his steadfast support of the Community and for his commitment, support, and dedication to our settlement.

This settlement is a monumental achievement for our Community and enjoys the unanimous support of our council, nine of whom are here with me today and are listed in my written testimony.

The Gila River Indian Community was formerly established by executive order in 1859. The community is comprised of the Akimel O'odham, or the Pima, and the Pee Posh, or the Maricopa, people. We are the largest Indian community in the metropolitan Phoenix

¹³From Fiscal Year 2000 onward, Bonneville receives a \$4.6 million interest credit on its Treasury debt payment to offset some of the cost of the Colville settlement. Therefore, Bonneville's share of the Colville payments total \$12.4 million net of the credit. This calculation conservatively assumes that Bonneville will be responsible for the entire Spokane payment.

area. Our reservation encompasses nearly 600 square miles with an enrolled membership of over 19,000.

Our history in the Phoenix Valley dates back thousands of years. Some of the most ancient agricultural irrigation systems in the world were built by our ancestors and can be found throughout the metropolitan Phoenix area. Agriculture was a mainstay of our community until very recent times. We are the Akimel O'odham, the river people, and as I have stated, we have resided in the Gila River Valley of Central Arizona for centuries. We are the direct ancestors of the Hohokum, who farmed the Gila River Valley since 300 A.D., developing hundreds of miles of irrigation canals for crops such as corn, squash, lima beans, tobacco, and cotton.

Together, the Akimel O'odham and the Pee Posh thrived on what the Gila River provided—food, water for irrigation, a way of life for our people. The river was our source of life and the center of our economic and social environment. It provided for all the community's needs, and as a result, the river people were among the most prosperous and self-sufficient communities, Indian and non-Indian, in the entire Phoenix Valley. As settlers moved to the Phoenix Valley, the Community adapted to and assisted the new settlers by providing food and protection. Members of our Community formed components of the first Arizona Territorial Guard.

This changed in the late 19th century. The settlements were established upstream from our tribal lands, including farmers, industry, and other landowners who began to divert water from the Gila River. As the turn of the century approached, the steady flow of the Gila River across our tribal lands diminished.

Today, the Gila River does not flow. It is now a dry river bed winding through our lands. The loss of the Gila River has resulted in great poverty for many members of our Community and has led to changes in our diet that has resulted in the highest per capita incidence of diabetes of any community in the world.

In 1989, our Community and the U.S. Government initiated water settlement negotiations to address the great uncertainty and about the allocation and dependability of water supplies to our reservation and to more than three million residents and businesses of Maricopa, Pinal, Pima, Yavapai, Graham, and Gila Counties in Central Arizona. Nearly 14 years later, we have reached a comprehensive settlement of our Community's water rights claims and the allocation and priority of water supplies among the major water users in Central Arizona.

The benefits of this settlement for our Community are many. Most importantly, it will guarantee a dependable water supply to our lands. In total, we will receive an annual entitlement of 653,500 acre feet of water, most of which will come from the Central Arizona Project, which delivers approximately 1.5 million acre feet of Colorado River water annually to Central Arizona. While this is only a fraction of the amount that we are legally entitled to, it does provide our Community with a new source of water to replace some of the Gila River water that we have lost.

The settlement agreement will also ensure construction and maintenance of the distribution system that would be needed to allow delivery of the water to the reservation. Together, the settlement water and the distribution system will enable our Community

members to farm tribal and allotted lands as well as provide them an opportunity to escape poverty and participate more meaningfully in the economy of the region. While there is little chance that we can recapture the prosperity of our ancestors, a settlement agreement will enable more tribal members to participate in our ancestors' way of life.

As a result of this settlement, the Community will also achieve a separate piece with non-Indian parties throughout Arizona. We are convinced that this is the right path for the Community at this time. There is no question that our presence may be missed by other tribes who are involved in ongoing litigation. However, the Community has deliberated on this at length and has made its choice. This is not to say that this was an easy choice. To achieve agreement, we, like all the other parties, have had to make compromises. Some were harder than others, but each was carefully considered and approved by our council.

The settlement agreement encompassed in the Arizona Water Settlement Act is the top priority of the Gila River Indian Community. We have expended enormous amounts of time and resources to reach this agreement with nearly every major water user in Central Arizona. While our Community and each party to this agreement will make sacrifices to fulfill this settlement, we will do so in exchange for dependable supplies of renewable water and a more certain economic future.

I again want to express my appreciation for the opportunity to come before you this morning. In conclusion and for the record, our settlement negotiations have been extremely transparent. Anyone or any entity who had an issue or concern with the settlement had a place at the negotiating table if, and if they wanted to participate. We are very hopeful that the Subcommittee will favorably consider this legislation and that it will be enacted in this Congress. Thank you.

Mr. HAYWORTH. Thank you, Governor Narcia.

[The prepared statement of Mr. Narcia follows:]

**Statement of The Honorable Richard P. Narcia, Governor,
Gila River Indian Community**

Thank you Chairman Calvert and Vice Chairman Renzi, and members of the Subcommittee on Water and Power. I am Richard Narcia, Governor of the Gila River Indian Community. I appreciate this opportunity to share with you the Community's strong support for the Arizona Water Settlements Act (H.R. 885). I would also like to take this opportunity to particularly thank you, Representative Hayworth, for your hard work and leadership in sponsoring this important legislation. I would also like to thank Senator Kyl for his steadfast support of the Community and for his commitment and dedication to our settlement.

This settlement is a monumental achievement for our Community and enjoys the unanimous support of our Council, ten of whom are here with me today. For the record, I would like to acknowledge each of them: Wally Jones, Eugene Blackwater, Jennifer Allison-Ray, Bernell Allison, Sr., Cecil Lewis, Gordon Santos, Gerald Sunna, Christopher Soke, Sr., Jonathan Thomas and Harry Cruye. Finally, I would also like to recognize and thank the members of the Community Water Negotiation Team for their hard work in making this a reality, including Council members who are also members of the Team—Harry Cruye, Jonathan Thomas, Chris Soke, Dana Norris, the former Director of the Office of Water Rights, Cecil Antone, the current Director of the Office of Water Rights, Rod Lewis, the General Counsel for the Community, Ardell Ruiz, Harlan Bohnee and Lee Thompson.

Introduction

By way of introduction, the Gila River Indian Community was formally established by Executive Order in 1859. The Community is comprised of the Akimel O'odham (Pima) and the Pee Posh (Maricopa) people. We are the largest Indian Community in the Phoenix metropolitan area, with a Reservation encompassing nearly 600 square miles and with an enrolled population of over 19,000. We have a long history in the Phoenix Valley, dating back thousands of years. Some of the most ancient agricultural irrigation systems in the world were built by our ancestors and can be found throughout the Phoenix metropolitan area. Agriculture was the mainstay of our Community until very recent times.

The Arizona Water Settlements Act will help reestablish our Community's access to renewable sources of water as compensation for the Gila River water taken from the Tribe beginning over a century ago. The return of dependable sources of water will enable more members of our Community to participate in our agricultural heritage and enjoy a better way of life.

The Arizona Water Settlements Act encompasses the largest Indian water claims settlement in U.S. history. This agreement has been negotiated over the last fourteen years by nearly all major water users in central Arizona, including representatives of our Community, state, local and other tribal governments, farming and industry. The agreement establishes and prioritizes the allocation of water among these parties. It concludes longstanding litigation that has been expensive and disruptive to our Community and to others in central Arizona, preventing us from planning future growth and impeding steps to achieve economic stability and political harmony in the region.

The Arizona Water Settlements Act also provides a mechanism for funding future Indian water rights settlements in Arizona and the construction of new water distributions systems for Indian tribes in the Phoenix Valley, as required under existing water settlement agreements. Thus, it provides major benefits for other Arizona tribes, both those that have already settled their water claims and are awaiting the construction of their water systems, as well as those that are seeking to settle their claims at some point in the future.

Our History

To fully appreciate the importance of the Arizona Water Settlements Act to our Community and its future, I would like to briefly review our history and the central role of water to our culture and economic prosperity.

We are the Akimel O'odham, the People of the River. We have resided in the Gila River Valley of central Arizona for centuries. The direct ancestors of the Akimel O'odham, the Ancient Hohokum, farmed in the Gila River Valley since at least 300 A.D., developing hundreds of miles of irrigation canals to supply water for crops such as maize, squash, lima beans, tobacco and cotton.

Together, the Akimel O'odham and Pee Posh thrived on what the Gila River provided—a plentiful source of food for tribal members, water for irrigation and a way of life for all the Tribes' people. The River was our breadbasket and the center of our economic and social life. It provided for all the Community's needs, and, as a result, the People of the River were among the most prosperous, self-sufficient communities, Indian and non-Indian, in the entire Phoenix Valley.

As settlers moved to the Phoenix Valley, our Community adapted to and assisted the new settlers by providing food and protection. Members of the Community formed a component of the first Arizona Territorial Guard.

This all changed in late 19th century. New settlements were established upstream from our Tribal lands, including farmers, industry and other landowners, who began to divert water from the Gila River. As the turn-of-the-century approached, the steady flow of the Gila River across our tribal lands diminished, and with this dependable water source went our vast farmlands and our ability to sustain all Members of our Community.

Today, the Gila River does not flow through our Tribal lands. It is now a dry river bed winding through the desert. The loss of the Gila River has resulted in great poverty to many Members of our Community, and has led to changes in our diet that have resulted in the highest per capita incidence of diabetes of any community in the world. Background to Arizona Water Settlements Act

Our struggle to regain the Gila River began in the early part of the last century. In 1924, Congress authorized construction of the Coolidge Dam as the primary feature of a new irrigation project—called the San Carlos Irrigation Project—that would provide irrigation for our Reservation. The 1924 Act was intended to address our loss of Gila River water and, in so doing, fulfill the trust obligation of the United States to our Community.

The 1924 Act was also to create a non-Indian component to this irrigation project. Unfortunately, although the 1924 Act provided that our component of this project was to be built before the non-Indian portion, our portion was never completed, and what was built was never adequately engineered or maintained. Thus, although the San Carlos Irrigation Project was intended to create an irrigation project for 50,000 of the irrigable acres on our Reservation, it never served more than 30,000 acres and today serves just over 15,000 acres.

In 1925, citing the 1924 Act, the United States sued water users upstream of our Community in order to reestablish existing rights of the Community in the Gila River. Unfortunately, the U.S. government, in all candor, did not do a very good job in making its case on our behalf, which resulted in greater frustration and increased federal liability to our Community. Our frustration was fed by the fact that when the Community sought to intervene itself in this litigation, the United States actually opposed our intervention. As a result, we were prevented then from actually participating in litigation that would set the framework for our struggle to protect our water rights up to the present day.

Ten years later, in 1935, this litigation ended in a settlement and consent decree—called the 1935 Globe Equity Decree—which recognized the Community's rights to 300,000 acre-feet of Gila River water each year. This was far less water than our people had access to for centuries prior to the settlement. Moreover, to this day, we have yet to receive much more than 100,000 acre-feet annually of the amount decreed in 1935. Thus, not only did the Community not receive recognition of all its water rights in 1935, it has not even received from the Gila River that to which the Globe Equity Court decreed it was entitled.

As a result, our Community has been forced to continue its struggle to vindicate its claims to water through litigation. First, in 1982, we began an effort in federal district court to enforce the 1935 Decree against upstream Gila River diverters. Second, we filed the single largest claim for water rights in the Gila River Adjudication, a separate State court proceeding begun in the mid-1970s to determine and establish the priority of water rights in the Gila River system and its tributaries. In this State court adjudication, we are claiming approximately 1.2 million acre-feet of water annually from these water systems and seeking judicial recognition that our water rights supercede those of all other non-Indian users.

Absent the comprehensive water settlement contained in the Arizona Water Settlements Act, we will have no choice but to continue to pursue our water rights through this litigation. We will also have to explore more actively any action we might have against the federal government for its failure to adequately protect and develop our water resources as required by its trust responsibility to the Community and its statutory obligations under the 1924 Act.

The Settlement Agreement and Arizona Water Settlements Act

In 1989, our Community and the United States Government initiated water settlement negotiations to address the great uncertainty about the allocation and dependability of water supplies to our Reservation and to the more than three million residents and businesses of Maricopa, Pinal, Pima, Graham and Gila Counties in central Arizona. Nearly 14 years later, we have reached a comprehensive settlement of our Community's water rights claims and the allocation and priority of water supplies among the major water users in central Arizona.

Our settlement is in many ways unique:

- One, it is the largest settlement of Indian water rights in U.S. history, at least to this date;
- Two, it involves thirty-five separate parties, both Indian and non-Indian, most of which have required separate negotiations and agreements to resolve the specific issues raised between them and the Community. It is a very large bundle of compromises, each of which was thrashed out with the full consideration of its implications and importance in the overall deal. Its very size precludes the possibility of it being perfect, but the Community recognizes that it would be unrealistic to expect perfection in a settlement of this size and scope. I can assure the Subcommittee that in each instance in which the Community has compromised, it has done so with due deliberation by both the Water Negotiation Team and, when necessary, the prior approval of the Council;
- Three, our settlement is part of a more comprehensive settlement of repayment issues between the United States and the Central Arizona Water Conservation District. This settlement establishes a unique framework for resolving funding and water supply issues not just for our settlement and that of the Tohono O'odham Nation, but also Indian water rights settlements already negotiated and approved in the past, and those to come in the future. This settlement component is critical to our settlement and without it, the settlement will not work;

- Four, although most Indian water settlements affect only a single State, ours includes water users in New Mexico as well. A number of the parties with whom we are settling are located in the State of New Mexico in the Virden Valley. Moreover, we have worked closely with the State of New Mexico to ensure our settlement does not adversely affect the exchange rights that the State of New Mexico obtained in the 1968 Colorado River Basin Project Act. We are now actively exploring with the State of New Mexico, along with all the other affected parties in the State of Arizona, means of potentially implementing these exchange rights. If other New Mexico concerns or interests are raised, we will, of course, do what we can to help to address them;
- Fifth, given the complexity of interests addressed in our settlement, and the very large number of parties involved, as well as our geographic location in close proximity to major metropolitan areas in the Phoenix area, the Community has been obliged to serve as the primary coordinator of all such negotiations and to work out issues between parties as well as our own. This has been a major undertaking on the part of the Community, but one that we believe is well worth the effort. As we approach Congress for consideration of this major piece of legislation, we can safely say that every essential issue that can be resolved in the context of one individual Tribe's settlement has been resolved; and
- Sixth, the Community has actively sought out the views of other parties potentially affected by this settlement, particularly other tribes, in an effort to explain our settlement and alleviate any concerns that we can. I have personally reached out to all other tribal leaders in the State in this regard. I cannot guarantee that we completely agreed with their concerns, but I know that we have made a fair and reasonable effort to do so. My own experience with other Indian water settlements in Arizona that were considered without any consultation or consideration of other tribes' concerns is a major motivation for me in this regard.

The benefits of this settlement for our Community are many. Most importantly, it will guarantee a dependable supply of water to our lands. In total, we will have an annual entitlement of 653,500 acre-feet of water under the agreement. Most of this will come from the Central Arizona Project, which delivers approximately 1.5 million acre-feet of Colorado River water each year to central Arizona. While this amount is only a fraction of the water to which we are legally entitled, it does provide our Community with new water sources to replace some of the Gila River water we have lost—our Community has a strong desire for actually deliverable water rather than rights to water that is not enforced.

The settlement agreement also will ensure construction and maintenance of the distribution systems that will be needed to allow delivery of water to the Reservation. Together, the settlement water and distribution infrastructure will enable more of our Community Members to farm Tribal lands and Allotted lands, as well as provide them an opportunity to escape poverty and to participate more meaningfully in the economy of the region. While there is little chance that we can recapture the past prosperity of our ancestors, the settlement agreement will enable more Tribal members to participate in our ancestors' way of life.

I would note that all funds that the Community is to receive as part of this settlement are being used solely for the development of a viable water delivery system for our farmers. One portion of the funds that the Community will receive from this settlement is to be used to rehabilitate and finally build out the long-awaited San Carlos Irrigation Project on our Reservation. Although authorized in 1924 and intended by Congress to be built prior to any non-Indian portions of that project, it never was completed and what was built has fallen into substantial disrepair.

The Community has agreed to use most of the funds it receives for that worthwhile end. The remaining balance is intended to assist the Community in making the CAP water it receives in lieu of its rights to the natural waters of the Gila River affordable for its Members and Allottees. The Community has committed to supplement the funds it receives from the settlement for this purpose.

As a result of this settlement, the Community will also achieve a separate peace with non-Indian parties throughout Arizona. The Community has struggled for this peace for many years, many times working hand in hand with other Arizona Indian Tribes, such as the San Carlos Apache Tribe. We are convinced that this is the right path for the Community at this time. There is no question that our presence may be missed by other tribes who are still involved in ongoing litigation. However, the Community has deliberated on this at length and made its choice.

This is not to say that our choice was easy. To achieve agreement, we, like all other parties to this settlement, have had to make many compromises along the way. Some were harder than others, but each was carefully considered and ap-

proved by our Council. We view the package as developed as one that is worthy of all our support.

The Arizona Water Settlements Act contains numerous benefits for Arizona. It will eliminate uncertainty among Indian communities, state and local government leaders, industry, farmers and other citizens, concerning future water use in central Arizona. This will enable long-term water planning to proceed for all concerned. The Act will help settle drawn-out and costly litigation of water rights and damage claims, enabling all parties to the settlement to refocus on future economic planning and growth.

The Act also will help ensure that existing water use in central Arizona and upstream of our Reservation on the Gila River will not be disrupted or displaced by our claims. Through lease and exchange agreements with the surrounding cities, the settlement provides for unique new opportunities for the Community and the surrounding municipalities to cooperate in their water use and planning. Finally, the Arizona Water Settlements Act, more than any federal government action since this water dispute began over a hundred years ago, will help satisfy the United States' trust responsibility to our Community and other Indian tribes. It will ensure dependable renewable water supplies and delivery to Tribal lands, as partial compensation for water taken from the Community, its Members and Allottees for over a century.

Conclusion

The settlement agreement encompassed in the Arizona Water Settlements Act is the top priority of the Gila River Indian Community. We have expended enormous amounts of time and resources to reach this agreement with nearly every major water user in central Arizona. While our Community, and each party to this agreement, will make sacrifices to consecrate this settlement, we will do so in exchange for dependable supplies of renewable water and a more certain economic future. For our Community, this settlement offers an opportunity for more of our Tribal members to partake in the rich agricultural heritage of our ancestors, the Akimel O'odham and Pee Posh.

I again want to express my appreciation for the opportunity to appear before the Subcommittee today to share our views on this historic legislation. We are very hopeful that the Subcommittee will favorably consider this legislation and that it will be enacted during this Congress so that our people—and so many other stakeholders in Central Arizona—may finally begin to realize the benefits that will flow from this long overdue water settlement.

Thank you.

[Response to questions submitted for the record by Governor Narcia follows:]

GILA RIVER INDIAN COMMUNITY, EXECUTIVE
OFFICE OF THE GOVERNOR & LIEUTENANT GOVERNOR,
October 31, 2003.

Hon. KEN CALVERT,
*Chairperson, Water and Power Subcommittee of the House Committee on Resources,
Longworth House Office Building, Washington, DC.*

DEAR CHAIRMAN CALVERT: Thank you for the opportunity to answer the follow-up question you submitted after the Water and Power Subcommittee's October 2, 2003, hearing on H.R. 885, Arizona Water Settlements Act. The answer to the question you submitted is attached.

Your interest and participating in the consideration of this important legislation is greatly appreciated by the members of the Gila River Indian Community (Community).

Please contact me if the Community can be of any assistance in the Committee's deliberations on H.R. 885.

Best Regards,

RICHARD P. NARCIA,
Governor

Enclosure.

* * *

Question. Unlike other Indian Water rights settlements, which frequently require the federal government to fund an open-ended development trust fund, all of the funds made available to the Community under H.R. 885 go

exclusively to fund water development and use on the Gila River Indian Reservation. Does this demonstrate the Community's commitment to fully utilizing its water supply?

Answer. All of the federal money that goes to the Community under H.R. 885 will go only to provide water for the Community's lands, the means to use this water, or help with paying the cost of CAP water. While we would certainly not be opposed to federal resources for other tribal projects, we realize that the size of our water rights claims and the resources needed to fulfill the promises made to the Community in the 19th and 20th centuries already requires a substantial commitment of federal resources. For that reason, we recognize that certain components, like a development fund, would not be included in our settlement.

The members of the Community are the descendants of the people who farmed in the valley for thousands of years. We view our Settlement as a way of preserving this fundamental part of our heritage.

RICHARD P. NARCIA

Mr. HAYWORTH. Now, it is my honor to recognize Chairwoman Joan-Saunders to testify on H.R. 885. Welcome.

**STATEMENT OF VIVIAN JUAN-SAUNDERS, CHAIRWOMAN,
TOHONO O'ODHAM NATION**

Ms. JUAN-SAUNDERS. Thank you. Good morning. I would like to thank Chairman Calvert and members of the Committee for scheduling this very historic day.

My name is Vivian Juan-Saunders. I am the Chairwoman of the Tohono O'odham Nation. The Tohono O'odham Nation is located in Southern Arizona. We have a land base of 2.8 million acres and an enrolled membership of 28,000. I would like to thank you for the opportunity to speak on the Arizona Water Settlement Act of 2003, which is a very critical issue for our people.

I would like to first express my appreciation to you, Representative Hayworth, for cosponsoring the introduction of the Settlement Act with Senator Kyl and recognize the other members of the Arizona Congressional delegation for your support, Mr. Renzi, Mr. Grijalva.

I would like to first of all recognize the extraordinary efforts of the negotiating team in reaching a consensus on the issues which enable the introduction of the amendments to the Nation's 1982 water settlement. The negotiating team included representatives of the Tohono O'odham Nation, our legislative counsel, the San Xavier District, the Schuk Toak District, the San Xavier allottees, the San Xavier Cooperative Farm, the State of Arizona, the city of Tucson, Asarco Incorporated, which is a copper mine, and Farmers Investment Company.

I would like to focus on the benefits which would be realized by water users in the Tucson Management Area as a result of the enactment and implementation of this Settlement Act, with particular emphasis on the amendments.

One, what has historically been widespread uncertainty regarding the rights of water users in the Tucson Management Area will be transformed into certainty regarding these rights.

Two, receipt of several significant benefits under the Southern Arizona Water Settlement Act was conditioned on final dismissal of the underlying water litigation, *United States v. Tucson*, including the annual delivery of 28,200 acre feet of water within the San Xavier and Eastern Schuk Toak Districts of the Nation, and collec-

tion of damages by the Tohono O'odham Nation for failure of the United States to deliver water to the districts.

In addition, the agreement by the Tohono O'odham Nation to waive and release past and future water claims and past injuries to water rights only takes effect on final dismissal of the United States v. Tucson. By agreement among the parties to the amendments, this lawsuit will be dismissed with prejudice. Under the amendments, the waiver and release of claims also extends to future injuries to water rights.

The parties' commitment to dismiss the lawsuit was predicated on resolving longstanding differences of opinion between the Tohono O'odham Nation, the San Xavier District, and the San Xavier allottees regarding the division of water and financial benefits under the Southern Arizona Water Rights Settlement Act, and in our testimony, we have outlined how these disputes have been resolved.

Four, a reliable source of funding is critical to the timely implementation of the amendments. The interest on the cooperative fund established under the Southern Arizona Water Rights Settlement Act is inadequate to fund the cost required to fulfill the obligations of the United States imposed by the Southern Arizona Water Rights Settlement Act and the amendments.

I would like to focus on the amendments and related settlement agreement. First of all, the city of Tucson has agreed to pay for the repair of sinkhole damage in the San Xavier District on allotted lands and lands held in trust for our Tohono O'odham Nation. Tucson has further agreed that the Tohono O'odham Nation's claims for subsidence damages in the San Xavier and Eastern Schuk Toak Districts are preserved and will be processed pursuant to the procedures outlined in the agreement.

Asarco, the copper mine, has agreed to accept Central Arizona Project water for processing ore at the Mission Mine and reduce groundwater withdrawals by an acre foot for each foot of CAP water delivered. The intended effect of this exchange is to stabilize or elevate the groundwater table in the San Xavier District. Subject to receiving adequate security to assure repayment, the Tohono O'odham Nation has agreed to provide a loan to Asarco Mine to construct the CAP delivery system to the mine.

Farmers Investment Company has agreed to various limitations on its groundwater withdrawals affecting the San Xavier District. The agreement will be recorded in the official records of Pima County to assure the limitations bind successors in interest.

And finally, certain provisions of Title I of the Settlement Act are essential to implementation of the amendments.

I would like to conclude by highlighting the new Federal obligations under the amendments. First of all, Sections 311(c)(1) and (2) authorizes the Secretary to expend sums not to exceed \$215,000 for the San Xavier District and \$175,000 for the Eastern Schuk Toak District for groundwater monitoring programs.

Second, Section 311(f) authorizes the Secretary to conduct a feasibility study of the land exchange between the allottees and Asarco Mine at a cost not to exceed \$250,000.

I would like to conclude by sharing that it has been 28 years since the first lawsuit was filed to clarify water claims. That was

in 1975. It has been 21 years, 1982, since the Southern Arizona Water Rights Settlement Act was passed here in Congress. We believe that the passage of these amendments will not only benefit the Tohono O'odham Nation, but benefit all water users in Southern Arizona. We strongly urge you to support the passage of these amendments and we, as a nation, will continue to support any efforts in compromise on issues that are still outstanding regarding water rights settlements for other tribes.

We thank you for the opportunity to testify.

Mr. HAYWORTH. And Chairwoman Juan-Saunders, we thank you for your testimony.

[The prepared statement of Ms. Juan-Saunders follows:]

**Statement of Vivian Juan-Saunders, Chairwoman,
Tohono O'odham Nation**

I. INTRODUCTION

Chairman Calvert and members of the Committee. I am Vivian Juan-Saunders, Chairwoman of the Tohono O'odham Nation. The Nation's Reservation is located in southern Arizona, has a land base of 2.8 million acres, and is the second largest Indian reservation in the United States.

On behalf of the 28,000 members of the Nation, I thank you for the opportunity to speak on the Arizona Water Settlements Act of 2003 which is an issue of critical importance to our people. I would like to first express my appreciation to Representative Hayworth who co-sponsored introduction of the Settlements Act with Senator Kyl, as well as other members of the Arizona delegation who have expressed their support.

I would also like to recognize the extraordinary efforts of the negotiating team in reaching a consensus on the issues which enabled the introduction of Amendments to the Nation's 1982 water settlement. The negotiating team included representatives of the Nation, the Nation's Legislative Council, the San Xavier District, the Schuk Toak District, the San Xavier allottees, the San Xavier Cooperative Farm, the State of Arizona, the City of Tucson, Asarco Incorporated and Farmers Investment Company. Officials in the Interior Department also actively participated in the negotiations.

The written testimony filed with this Subcommittee includes a detailed summary of the Southern Arizona Water Rights Settlement Act of 1982 ("SAWRSA"); the Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments"); and cost and appropriation items related to the Amendments.

I would like to focus on the benefits which would be realized by water users in the Tucson Management Area ("TMA") as a result of the enactment and implementation of the Settlements Act, with particular emphasis on the Amendments.

1. What has historically been wide-spread uncertainty regarding the rights of water users in the TMA would be transformed into certainty regarding these rights.

2. Receipt of several significant benefits under SAWRSA was conditioned on final dismissal of the underlying water litigation (*United States v. Tucson*), including the annual delivery of 28,200 acre-feet of water within the San Xavier and eastern Schuk Toak Districts of the Nation; and collection of damages by the Nation for failure of the United States to deliver water to the Districts. (Under the Amendments, the damage remedy would also apply to a failure of the United States to complete the rehabilitation and extension of the Cooperative Farm within stated deadlines.) In addition, the agreement by the Nation to waive and release past and future water claims, and past injuries to water rights, only takes effect on final dismissal of *United States v. Tucson*. By agreement among the parties to the Amendments this lawsuit will be dismissed with prejudice. Under the Amendments, the waiver and release of claims also extends to future injuries to water rights.

3. The parties' commitment to dismiss the lawsuit was predicated on resolving long-standing differences of opinion between the Nation, the San Xavier District and the San Xavier allottees regarding the division of water and financial benefits under SAWRSA. These disputes have been settled as follows:

(a) The Amendments provide an apportionment of water between the Nation, and the San Xavier District and San Xavier allottees.

(b) The Amendments provide the San Xavier District with the option to cash out the construction costs of a new farm authorized for construction

under SAWRSA. If that option is exercised, the District and the allottees will be entitled to use the funds for a variety of purposes.

(c) The Nation has agreed to make a substantial financial contribution to subjugate lands within the proposed extension of the allottees' Cooperative Farm, provide working capital for the Cooperative Farm and to remediate contaminated groundwater within the San Xavier District. The amount of this contribution significantly exceeds the appropriations required by the Amendments.

4. A reliable source of funding is critical to the timely implementation of the Amendments. The interest on the Cooperative Fund established under SAWRSA is inadequate to fund the costs required to fulfill the obligations of the United States imposed by SAWRSA and the Amendments. This shortfall is addressed in the Amendments.

(a) The Amendments provide for a significant adjustment in the principal amount of the Fund.

(b) The Amendments also provide for the deposit in the Fund of all proceeds of sale of recharge credits received by the United States in a managed recharge project in the Santa Cruz River, using a portion of the 28,200 acre feet of effluent water deliverable by Tucson under SAWRSA.

(c) The Amendments authorize the use of the Lower Colorado River Basin Development Fund to pay identified costs of implementing the settlement.

5. Under the Amendments and related Settlement Agreement:

(a) Tucson has agreed to provide \$300,000 to repair sinkhole damage in the San Xavier District on allotted lands and lands held in trust for the Nation. Tucson has further agreed that the Nation's claims for subsidence damages in the San Xavier and eastern Schuk Toak Districts are preserved, and will be processed pursuant to the procedures outlined in the agreement;

(b) Asarco has agreed to accept Central Arizona Project (CAP) water for processing ore at the Mission Mine and reduce groundwater withdrawals by an acre foot for each acre foot of CAP water delivered. The intended effect of this exchange is to stabilize or elevate the groundwater table in the San Xavier District. Subject to receiving adequate security to assure repayment, the Nation has agreed to provide a loan to Asarco of up to \$800,000 to construct the CAP delivery system to the Mine; and

(c) Farmers Investment Company has agreed to various limitations on its groundwater withdrawals affecting the San Xavier District. The agreement will be recorded in the official records of Pima County to assure the limitations bind successors in interest.

6. Finally, certain provisions of Title I of the Settlements Act are essential to implementation of the Amendments:

(a) SAWRSA did not identify the source for the 28,200 acre feet of water. Title I identifies CAP agricultural priority water as the source of water to satisfy the annual delivery of the 28,200 acre feet identified in SAWRSA;

(b) Title I obligates the United States to firm the 28,200 acre-feet of CAP agricultural priority water to a municipal and industrial delivery priority, with financial or in-kind assistance provided by the State of Arizona; and

(c) Title I provides that unallocated CAP water and dedicated funding will be available for future Indian water settlements. These features of the Settlements Act are of particular importance to the Nation in order to facilitate the settlement of the Nation's remaining water claims in the Sif Oidak District and portions of adjoining Districts which are within the boundaries of the Pinal Active Management Area.

II. SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT OF 1982

A. Overview of Settlement

In 1975 the Papago Tribe (now the Tohono O'odham Nation), the United States and two individual Indian allottees, as representatives of a class of Indian trust allotment landowners in the San Xavier District, sued the City of Tucson and other water users in the Upper Santa Cruz Basin, claiming damages and seeking to enjoin pumping of groundwater (*United States v. Tucson*). There was concern that the litigation would cast a cloud over the future of the Tucson area. Local entities engaged in extensive negotiations with the United States and the lawyers for the Indian parties and finally reached a settlement in 1982. In October 1982, Congress passed the Southern Arizona Water Rights Settlement Act of 1982, 96 Stat. 1274 ("SAWRSA"), which embodied the settlement.

The terms of the settlement called for the Nation to receive, without charge, farm improvements, 66,000 acre feet of water annually, the right to pump 10,000 acre feet of groundwater annually within the San Xavier District and a \$15 million trust fund. (Of the 66,000 acre feet, 37,800 acre feet is the Nation's contracted Central Arizona Project (CAP) water for the San Xavier District and the eastern Schuk Toak District.¹ An additional 28,200 acre feet of the water was to be acquired by the Secretary and delivered after *United States v. Tucson* was dismissed.) The City was required to transfer 28,200 acre feet of effluent water to the United States and, with the State and other local entities, to contribute a total of \$5.25 million to a Cooperative Fund. Interest on the Cooperative Fund was available to the United States for payment of the ongoing costs of implementing the settlement. The San Xavier allottees' water rights were to be satisfied out of water provided to the Nation in the settlement.

The City, State and local interests timely performed all of their obligations under the settlement and the Nation agreed to dismiss the case. The San Xavier allottee landowners objected to certain aspects of SAWRSA and opposed dismissal of the litigation.

In 1993, allottees filed a class action lawsuit (*Alvarez v. Tucson*) in which they sought to enjoin groundwater pumping by the City and others, and asserted more than \$200 million damages. Individual San Xavier allottees also filed a lawsuit in 1993 against the United States (*Adams v. United States*) which asserted breaches of trust related to the allottees' land and water resources, and sought declaratory and injunctive relief. Dispositive motions in these lawsuits are pending before the Court. Rulings on the motions have been suspended to allow the SAWRSA parties to negotiate amendments which would resolve the outstanding issues among the parties.

For many years, the Nation, the San Xavier District, the Schuk Toak District, the allottees, the City of Tucson, the State of Arizona, Asarco Incorporated and Farmers Investment Co. negotiated amendments to SAWRSA that would allow full implementation of the settlement, provide important clarification in the allocation of existing benefits, and provide more flexible water use by the parties.

B. Specific Benefits and Obligations of Parties

The following is a summary of the substantive provisions of SAWRSA, as amended by the Southern Arizona Water Rights Technical Amendments Act of 1992 (106 Stat. 3256).

Nation's Benefits:

1. The United States is required to annually deliver 37,800 acre feet of CAP water without the Nation having to pay any OM&R or capital charges.
 - a. 27,000 acre feet for San Xavier District
 - b. 10,800 acre feet for eastern Schuk Toak District
2. The United States is required to improve and extend the allottees' Cooperative Farm in San Xavier and to construct irrigation works for a new farm in San Xavier to take the CAP water.
3. The United States is required to annually deliver an additional 28,200 acre feet of water suitable for agriculture, after the pending water claims litigation is finally dismissed:
 - a. 23,000 acre feet to San Xavier District; and
 - b. 5,200 acre feet to eastern Schuk Toak District.
4. If the United States fails to deliver any of the 66,000 acre feet in any year after October 1992, it must pay the Nation damages equal to the value of the undelivered quantity of water (the deadline was extended to June 30, 1993 by the Technical Amendments enacted in 1992).
5. The United States established a \$15,000,000 Trust Fund which is managed by the Nation, the interest from which can be used to develop land and water resources within the Nation.

Nation's Obligations:

1. The Nation agreed to file a stipulation for dismissal of *United States v. Tucson*, and to file in court the allottee class representatives' petition to dismiss.
2. The Nation agreed to waive and release all past claims of water rights or injuries to water rights, and to waive and release all future claims of water rights. This waiver and release encompasses past and future claims of federal reserved water

¹ The Tohono O'odham Nation is the national government and consists of Districts organized as political subdivisions of the Nation. The San Xavier and Schuk Toak Districts are two of the 11 Districts of the Nation. The San Xavier District and the eastern portion of the Schuk Toak District are within the Upper Santa Cruz Basin and are part of the SAWRSA settlement.

rights in the San Xavier District and the eastern Schuk Toak District. The waiver and release does not take effect until *United States v. Tucson* is finally dismissed.

3. The Nation agreed to limit pumping of groundwater:
 - a. To 10,000 acre feet per year in the San Xavier District; and
 - b. To the 1981 pumping amount in the eastern Schuk Toak District.
4. The Nation agreed to comply with the water management plan established by the Secretary of the Interior.

City's Obligations:

1. The City agreed to make 28,200 acre feet of effluent available to the Secretary.
2. The City contributed \$1,500,000 to a Cooperative Fund, the interest from which is for "carrying out the obligations of the Secretary" under provisions of the settlement.

Other Obligations:

1. Other contributors to the Cooperative Fund were:
 - State of Arizona—\$2,750,000
 - Anamax, Cyprus-Pima, AS&R ("Asarco"), Duval & Farmers Investment Co. ("FICO")—\$1,000,000
 - United States—\$5,250,000
2. If *United States v. Tucson* was not dismissed by October 1985, the Cooperative Fund was to be terminated and the contributed funds returned to the contributors (this provision was deleted by the Technical Amendments in 1992).
3. The United States is not obligated to annually deliver the 28,200 acre feet of water to the Nation until *United States v. Tucson* is finally dismissed.
4. The United States is not obligated to pay the Nation damages for failure to annually deliver any of the 66,000 acre feet of water until *United States v. Tucson* is finally dismissed.
5. The Nation can only use its settlement water within the Tucson Management Area (TMA).
6. The Nation can sell or lease settlement water, but only within the TMA.

III. SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT AMENDMENTS ACT OF 2003

The Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments") appears as Title III in the Arizona Water Settlements Act of 2003 (the "Settlements Act"). Subject to the satisfaction of all conditions to the effective date of the Amendments (Section 302), the Amendments will clarify, restate, supplement and modify the provisions of SAWRSA in the following respects:

1. The Secretary would be obligated to annually deliver 28,000 acre feet of water from the federal share of CAP water. The Secretary and the State are required to cooperate in a program to firm this CAP water to municipal and industrial delivery priority pursuant to the obligations in Section 105 of Title I to the Settlements Act;
2. The Secretary would be required to rehabilitate and extend the allottees' existing Cooperative Farm by a date certain, or pay specified penalties. The Farm would be extended to 2,300 acres. Rehabilitation of the Cooperative Farm would include bank stabilization on the Santa Cruz River and repair of sinkholes;
3. Pursuant to an agreement between the Nation, the San Xavier District and the allottees, the Nation would make a substantial financial contribution for subjugation of lands within the proposed extension to the Cooperative Farm, working capital for the Cooperative Farm and a fund to remediate contaminated groundwater within the District;
4. The San Xavier District would receive the option of taking cash instead of construction of a new farm;
5. Penalties payable by the United States for failure to timely perform its obligations with regard to the Cooperative Farm and its extension would be payable to the Cooperative Farm Association;
6. The San Xavier District and the allottees would be entitled to annually receive up to 35,000 acre feet of the settlement water for beneficial use, subject to compliance with the Nation's water code;
7. SAWRSA does not provide for specific releases of claims for future injuries to water rights. The release of claims for future injuries to water rights would be required by the Amendments so long as groundwater withdrawals outside the San Xavier District are in compliance with State law and with the related Settlement Agreement;
8. The waiver and release of water rights by the Nation and the allottees, other than the rights established in SAWRSA, would be confirmed, clarified and made more explicit. One of the conditions to the effective date of the Amendments would

be final dismissal of the litigation. As to any allottees who opt out of a class, their water rights, if any, would be barred;

9. Lands acquired by the Nation outside the boundaries of the Nation's Reservation which the Nation seeks to have taken into trust by the United States will not include federal reserved rights to surface water or groundwater;

10. SAWRSA now limits the Nation to pumping no more than 10,000 acre feet of groundwater per year within the San Xavier District, with no provisions for underground storage and recovery. The Amendments would create a deferred pumping storage account, with an initial credit to recognize a portion of the groundwater allowance that has not been pumped since 1983. Withdrawals from the deferred pumping storage account could not exceed 10,000 acre feet in any year or 50,000 acre-feet over any ten-year period. The Amendments would also allow direct underground storage and recovery of surface water, in a manner similar to that provided for under current State law. Comparable provisions are made for pumping groundwater within the eastern Schuk Toak District. The Nation could also pump additional groundwater during CAP shortage periods and interruption in CAP deliveries;

11. SAWRSA now requires that all of the Nation's water be used within the boundaries of the Tucson Management Area (TMA). The Amendments would allow the Nation to lease its water outside the TMA, after giving a right of first refusal to users within the TMA. It would also allow the Nation to use a portion of its settlement water within the Nation's Reservation outside of the TMA;

12. A new comprehensive Settlement Agreement among the Nation, the allottee classes, the United States, the State of Arizona, the City of Tucson, Asarco and FICO would be approved by the Amendments; and

13. Separate agreements would be entered into among the Nation, United States, allottees and Tucson; the Nation, San Xavier District, allottees, the United States and Asarco; and the Nation, San Xavier District, allottees, United States and FICO. These agreements would be confirmed and approved by the Amendments.

a. The Tucson Agreement provides:

(i) For the payment by the City of Tucson of \$300,000 to the San Xavier District to establish a sinkhole remediation fund to be used to maintain and repair any future sinkholes after the United States has completed its sinkhole repair project; and

(ii) For the release by the United States and the allottees of past, present and future claims for damages from sinkholes or subsidence; release by the United States and the Nation of past, present and future claims for damages from sinkholes; and an administrative process for review by the City of any claim of the Nation for damages from subsidence before any court action is filed on such claim.

b. The Asarco Agreement provides:

(i) Up to 10,000 acre feet of the 35,000 acre foot allocation of CAP water for use in San Xavier will be delivered annually to Asarco for mining purposes in exchange for an equivalent reduction in groundwater pumping pursuant to a water agreement with the Nation;

(ii) Asarco will have an option to renew the existing on-Reservation well site lease with the Nation for an additional 25 year term;

(iii) Subject to adequate security to assure repayment, the Nation agrees to loan Asarco up to \$800,000 for construction of a CAP delivery system repayable over a period not to exceed 14 years;

(iv) Pursuant to A.R.S. § 45-841.01, the Nation is qualified to earn marketable storage credits which have an assigned value under the Asarco Agreement and are used to repay the Asarco loan and thereafter apportioned between the Nation and the San Xavier District;

(v) With the exception of discharges of toxic or hazardous substances to groundwater, certain claims for groundwater contamination by Asarco are settled by Asarco payments of water lease delivery charges into a settlement fund, with Asarco making additional direct payment from its funds to the extent of any shortfall in the scheduled payment amount; and

(vi) Waivers and releases of all past and future claims by the Nation, San Xavier District, allottees, United States and Asarco related to withdrawal of groundwater by the parties within the TMA.

c. The FICO Agreement provides:

- (i) Limitation of 850 acre feet annual withdrawal of groundwater by FICO within two miles of the exterior boundaries of the San Xavier District;
- (ii) Limitation of 36,000 acre feet annual withdrawal of groundwater by FICO from all FICO lands;
- (iii) Prohibition on FICO from selling groundwater credits to third parties for withdrawal within three miles of the exterior boundaries of the Tohono O'odham Nation;
- (iv) Except as otherwise provided in (i), (ii) and (iii) above, waivers and releases of all past and future claims by the Nation, allottees, United States and FICO related to withdrawal of groundwater by the parties within the TMA;
- (v) FICO shall record the Agreement in the official records of Pima County upon the effective date of the Amendments; and
- (vi) Terms of the Agreement are binding on heirs, devisees, executors, assigns and successors of the parties.

IV. FUNDING COSTS UNDER AMENDMENTS

The following is a summary of the various provisions in the Amendments that authorize use of the Lower Colorado River Basin Development Fund. The summary first discusses federal obligations in the Amendments that arise from obligations in SAWRSA and second new federal financial obligations under Amendments.

A. FEDERAL OBLIGATIONS ARISING FROM SAWRSA

Section 304(c)(3)(B): Authorizes the Secretary of the Interior to pay to the San Xavier District the sum of \$18,300,000 in lieu of, and in full satisfaction of, the obligation of the Secretary to construct a "new farm" in the San Xavier District including design and construction activities relating to additional canals, laterals, farm ditches, and irrigation works for the efficient distribution of water described in section 303(a)(1)(A) of SAWRSA. Use of the funds is regulated pursuant to section 304(f).

History of the Expenditure. Section 303(a)(1)(B) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to improve and extend the irrigation system, including the design and construction of additional canals, laterals, farm ditches and irrigation works, necessary for the efficient annual distribution for agricultural purposes of 27,000 acre feet of water referred to in 303(a)(1)(A) of SAWRSA. Section 304(c)(3)(B) of the Amendments gives the San Xavier District the option to cash out the construction benefit of a new farm and thereby use the portion of the 27,000 acre feet annual distribution not required for the existing or extended Cooperative Farm for other purposes. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to Section 302.

Sections 308(d)(2)(A)(i) and (ii): Authorizes the Secretary to enter into a contract with the San Xavier District and to pay a sum not to exceed \$891,200 for the development of a water management plan for the San Xavier District and authorizes the Secretary to enter into a contract with the Nation and to pay a sum not to exceed \$237,200 for the development of a water management plan for the eastern Schuk Toak District.

History of the Expenditure. Section 303(a)(3) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to establish water management plans for the San Xavier District and the eastern Schuk Toak District, that have the same effect as those plans developed under State law. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Section 310(a)(2)(A)(ii): Establishes that the Cooperative Fund may be increased in principal by an amount not to exceed \$32,000,000 based on a determination by the Secretary that the additional funds are necessary to carry out the Amendments and after providing notice to Congress.

History of the Expenditure. Section 313(b)(3)(B) of SAWRSA provided for an additional sum up to \$16,000,000 which the Secretary determined to be necessary to meet the Secretary's obligations, after providing notice to Congress. SAWRSA provides that the \$16,000,000 shall be adjusted pursuant to Section 312(b)(2). Section 313(b)(2) states that the adjustment represents the additional interest that would have been earned by the Cooperative Fund had the monies been contributed initially. The Technical Amendments to SAWRSA enacted in 1992 inadvertently dropped the reference to the means for calculating the adjustment. Thus, the requirement to adjust the \$16,000,00 existed between 1982 and 1992.

Section 317(a)(1): Authorizes an expenditure of \$3,500,000 (adjusted for fluctuations in construction costs) to construct features of the irrigation systems described

in Sections 304(c)(1) through (4) that are not authorized to be constructed under any other provision of law.

History of the Expenditure. Section 303(a)(4) of SAWRSA authorizes the appropriation of up to \$3,500,000, adjusted for fluctuations in construction costs.

Section 317(a)(5): Authorizes an expenditure of \$4,000,000 to carry out Section 311(d).

History of Expenditure. Section 303(b)(1) of SAWRSA authorized the Secretary to carry out a study to determine the available and suitability of water resources within the Sells Reservation. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to Section 302.

B. NEW FEDERAL OBLIGATIONS OF AMENDMENTS

Sections 311(c)(1) and (2): Authorizes the Secretary to expend sums not to exceed \$215,000 for the San Xavier District and \$175,000 for the eastern Schuk Toak District for groundwater monitoring programs.

History of the Expenditure. The tribal parties and the federal team reached agreement on this new obligation prior to the introduction of S. 3231, the Arizona Water Settlements Act of 2000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to Section 302.

Section 311(f): Authorizes the Secretary to conduct a feasibility study of a land exchange between the allottees and Asarco at a cost not to exceed \$250,000.

History of the Expenditures. This is a new obligation. The introduction of S. 2992, the Arizona Water Settlements Act of 2002, included a land exchange study with Asarco but did not provide a specific dollar amount for the study. The Amendments have included a sum not to exceed \$250,000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to Section 302.

Mr. HAYWORTH. Let me yield at this juncture to my colleague from Arizona because he, in exercising his Congressional prerogative, would like to introduce the next witness.

Mr. RENZI. Thank you, Chairman. I want to take a minute to share with my friends here today a little history and welcome Chairwoman Kathy Kitcheyan from the San Carlos Apache Tribe. I apologize for not having a better seat at the table for you. You certainly deserve better.

Chairwoman Kathy Kitcheyan is a former teacher and educator and longtime advocate on health and children's issues both nationally as well as in Arizona. Chairwoman Kitcheyan was the first woman elected to the Chair position of her tribe in a long history of great leaders of the Apache Nation.

I want to thank you for coming here today. I know that you have had some concerns and we all listen with interest. Welcome.

Mr. CALVERT. Thank you, Mr. Chairman.

Ms. KITCHEYAN. I guess that means it is my turn.

Mr. HAYWORTH. Yes, ma'am, Madam Chairwoman. It is your turn to testify. Welcome.

STATEMENT OF KATHY W. KITCHEYAN, TRIBAL CHAIRWOMAN, SAN CARLOS APACHE TRIBE, ACCOMPANIED BY JOE SPARKS, SPECIAL COUNSEL, SAN CARLOS APACHE TRIBE

Ms. KITCHEYAN. Thank you very much. I feel like I need to say this because the day before and today, I feel like I am a woman with very few friends in Washington, D.C., so I want to point out something in this room. That man over there, Morris Udall, was a true friend of Apache people, him and his brother Stewart. I interned for him in the 1970s under the National Indian Youth Council, and I hope I have a friend here today.

Having said that, I would like to say good morning. J.D. Hayworth, from the Great State of Arizona and Congresswoman Napolitano, and sir, I don't know your name, I am sorry—Steve Lanich, OK. Good morning, sir. Kyle Weaver. And, of course, our Congressman, Rick Renzi. Thank you for that introduction.

You have my written testimony, so I am not going to read it verbatim. You guys all have a master's or doctor's degree and I am sure you can read that on your own.

Anyway, today, I am here alone with two of my council members, Mary Moses and Karen Kee, and also our attorney, Joe Sparks. Our reservation was first established with a treaty in 1852, and in the beginning, our reservation was over two million acres. But due to the greed of ranchers and farmers and unscrupulous politicians, it was reduced five times. Why? Because they discovered copper, silver, gold, and water. Had that not been done, our unemployment rate today would not be 76 percent. It was about money then, and today, I personally feel that it is about money, too.

I, along with many other friends and relatives, were raised on the banks of the Gila River. It flowed well in those days. It was our playground and also sustained our crops. Many of our people had their own gardens. With the eventual growth of the mining industry, expansion of the ranching and farming community upstream, the flow of the Gila River slowed down tremendously. According to the Globe Equity Decree of 1935, the San Carlos Apaches are supposed to get 6,000 acre foot of water to irrigate 1,000 acres. But today, we barely get enough water to irrigate 400 acres. Imagine that. There have been occasions when the water commissioner calls to tell us to turn off our river pumps while Upper Valley users have their pumps running 24 hours a day.

Under this proposed legislation for CAP water, we will most likely pay \$74 per acre foot, while non-Indians pay anywhere from \$26 to \$28 per acre foot. This is such a disparity. I say it is a severe injustice and discriminating.

The other issue, Coolidge Dam, named after one of our Presidents, Calvin Coolidge, synonymous with San Carlos Lake. This Act will certainly result in its destruction. Imagine that. It would be a national disgrace because it is named after one of our Presidents.

It will also choke off a large majority of the natural surface flow from the Gila River and encourage the discharge of sewer water into the river by upstream communities.

If Coolidge Dam dies also, millions of birds and fish will, too, including species listed under the Endangered Species Act, the Southwestern willow, the flycatcher, the razor back sucker, and the bald eagle. This is why our tribe has tried for decades to get a minimum pool established in the lake of at least 75,000 acre foot, and I believe J.D. Hayworth was instrumental a few years back in helping us with that. We can store our CAP water here, but only if we can pay that \$74 per acre foot for the CAP water.

In our treaty with the U.S. Government, they have agreed to uphold its trust responsibility in the protection of land, natural resources, and water. We, as Apaches, have also pledged to be loyal and law abiding in all areas. We have lived up to our end of the bargain, even though we were not made citizens until 1924, even

though we did not have the voting franchise until 1948. We have been loyal to the government. All we are asking for in this settlement is equity and fairness. It is not a window of opportunity for us. There is no benefits for us as the bill is written and we would like equal funding for the San Carlos Apaches.

In our culture, water is very sacred, and this may be difficult for some of you to understand, but it is the lifeline of our existence, along with our language, our culture, and our spirituality. Therefore, it is not about fame. It is not about money. And it is not about power.

Thus, we should not be taken lightly. Just because we are a small tribe with no political clout and just because we are a tribe with limited financial resources and can't contribute for someone's reelection, that does not mean we should get the scraps. We are a proud and honorable people and will continue to talk in good faith to anyone that will listen to us. And we certainly appreciate the efforts of Mr. Renzi and anyone that will help us.

Thank you very much, Mr. Hayworth.

Mr. HAYWORTH. And Chairwoman Kitcheyan, we thank you very much for your testimony.

Representing the State of Arizona, Mr. Herb Guenther is here, and we would appreciate your testimony, sir.

**STATEMENT OF HERBERT R. GUENTHER, DIRECTOR,
ARIZONA DEPARTMENT OF WATER RESOURCES**

Mr. GUENTHER. Thank you, Mr. Chairman, members. I am here on behalf of Governor Janet Napolitano, who sends her regards and her testimony will be introduced into the record.

I am not going to speak to the comments, as you can all read the comments as far as our participation within the bill. The State of Arizona strongly supports the bill as it stands today and will continue to work on those aspects of the bill that need some finishing touches, as well as those which are currently in negotiation, such as Title IV.

This effort has taken, at least a couple of the titles, over 30 years to bring to closure. There are a lot of people who have a good portion of their lifetime invested in this settlement. It is an extremely complex settlement, as you can imagine, involving well over two-thirds of the water users in the State of Arizona. So just by its nature, it is extremely delicate. It is a house of cards with each card maintaining a certain—sharing the burden of the rest.

The main issues here that give us comfort is primarily the stipulated settlement of longstanding litigation. All three titles that are active have brought to closure extended litigation, and hopefully, those will go a long way to giving people a longer predictability, more predictability about their water supply, and therefore, more reliability and the realism that, in fact, they can plan for their future accordingly.

Again, Mr. Chairman, members, we support the legislation in its entirety and we pledge our continuing participation in trying to resolve those outstanding issues and bringing those to successful closure, as well. I stand ready to answer any questions.

Mr. HAYWORTH. Mr. Guenther, thank you very much.

[The prepared statement of Governor Napolitano follows:]

**Statement of The Honorable Janet Napolitano, Governor,
State of Arizona**

Chairman Calvert, and Members of the Subcommittee:

Good morning, and thank you for the opportunity to present the views of the State of Arizona on H.R. 885, the Arizona Water Settlements Act of 2003.

It is now time for Congress to confirm the agreements reached after many years of intense negotiations and compromise. With passage of H.R. 885, and implementation of the settlements, Arizona will embark on a new age of water resource planning, usage and cooperation.

The legislation encompasses multiple Titles to resolve many longstanding water disputes in Arizona. Additionally, it provides benefits to New Mexico. Each Title addresses a particular settlement agreement, and provides the congressional authorization and funding needed to implement the settlement. Many times in the past, Congress has been faced with enacting legislation to authorize settlements that have not been finalized. I am pleased to inform the Committee members that the three settlement agreements to be "authorized, ratified, and confirmed" by Act of Congress have been executed by the State of Arizona, the tribes, and nearly all of the non-Indian parties, except the Secretary of the Interior. The Secretary requires congressional authorization prior to signing the settlements. There is no question that the parties intend to settle the issues, and, in fact, many of the parties are carrying out their government functions as if the settlements were already final.

This legislation is vitally important to the future of Arizona, in economic terms, in meeting water management goals, and in furthering our relations with our tribal citizens. H.R. 885 will provide the mechanisms to resolve two major tribal water settlements immediately, and will provide the United States and non-Indian parties additional tools to resolve water rights claims of other Arizona tribes. It establishes a means for acquiring water and funding for future tribal water rights settlements.

Let me provide some highlights of each Title and why each is so important to all the people of Arizona.

Title I: Central Arizona Project Settlement

Since statehood in 1912, Arizonans have dreamed of bringing Colorado River water to the cities and farms of central Arizona. It was the great Senator Carl Hayden's dream. The recently deceased John Rhodes, former House minority leader, claimed passage of legislation to authorize the Central Arizona Project (CAP) as his greatest achievement in his 30 years in Congress. The CAP authorization became a reality in 1968 and by 1985 the CAP was delivering Colorado River water to farms and communities, as a replacement for groundwater. It continues to be our lifeblood, allowing many Arizonans to weather the drought conditions of eight of the last nine years. We continue to enhance the use of CAP, and this legislation furthers the State's water management goals utilizing the CAP.

Title I is consistent with, and in furtherance of, the intent of the stipulated settlement approved by the U.S. District Court of the litigation between the United States and the Central Arizona Water Conservation District (CAWCD) over the amount of repayment for the CAP. This Title also resolves other non-contract issues between the United States and the non-Indian CAP water users. Further, Title I provides the means to acquire the water supplies and funding necessary for the settlements in the other Titles of H.R. 885, and for future tribal water settlements.

Final division of the Colorado River water for the CAP between the state users and the federal users is important to the State. With this legislation, approximately 47% of the CAP will be dedicated for use by Arizona Indian tribes. The rest has been, or will be, allocated among the many Arizona non-Indian municipal, industrial and agricultural users. As part of Title I, 65,647 acre-feet of CAP high priority rights will be reallocated to Arizona cities, towns and water companies for municipal and industrial use. This reallocation has been pending for years after an extensive public process by the Arizona Department of Water Resources.

To acquire water for tribal water settlements, Title I provides a mechanism for agricultural interests to relinquish their CAP subcontracts in return for debt relief from Section 9(d) of the Reclamation Project Act of 1939 totaling \$158 million (shared by the federal government and state interests). Additionally, Title I provides for waivers of water rights claims by certain Indian tribes, and regulatory relief from the Reclamation Reform Act (RRA). It is important to the State that the water for tribal settlements, over and above that contributed by the parties, be acquired water from willing rightholders and not water taken by the federal government. Early tribal settlements were based on this concept, but in the 1990s the Secretary and Congress allocated water for settlements despite concerns raised by the State.

We hope that the provisions of Title I can be a precedent for settlements throughout the country.

The 1982 Reclamation Reform Act (RRA) has prevented the State from making full use of the CAP, which was designed to replace existing groundwater use for agriculture. Some lands are not eligible to receive CAP water due to RRA and are instead still irrigated with groundwater. Additionally, the administrative costs of implementing RRA in Arizona outweigh any perceived benefits to the government. The relinquishing districts would then be able to purchase CAP water over the next 30 years from year-to-year agriculture pools at an affordable price. RRA relief for the agricultural districts within the CAP service area, as provided in Title I, furthers implementation of the Arizona Groundwater Code, and our effort to preserve our depleted groundwater supply for future generations.

The water acquired pursuant to the CAP agricultural subcontract relinquishments will be used in the water budgets for the Gila River Indian Community settlement in Title II, for the Tohono O'odham Nation settlement amendments in Title III, and provide the Secretary of the Interior with additional water for future Arizona tribal water settlements, for a total of 197,500 acre-feet of water. Up to an additional 96,295 acre-feet will be provided for the State to hold in trust for a period of time and then reallocate to municipal and industrial water users in Arizona.

Title I also authorizes an agreement between Arizona and the Secretary to share in the "firming" of 60,648 acre-feet of the tribal CAP water to make it a more reliable water source for tribes to use for municipal and industrial purposes. Firming is the process of storing water underground today to be used when the dedicated surface water supply is lacking due to shortages. The State is obligated to firm 15,000 acre-feet for the Gila River Indian Community Water Rights Settlement, and another 8,724 acre-feet for future Arizona Indian tribal settlements. Through the Arizona Water Banking Authority we have begun a process to identify the best ways to meet this obligation, and to examine whether additional state law authorizations are needed, as well as funding options.

Arizona has been concerned in the past about proposals to market water out-of-state, in derogation of the Law of the River, the Indian non-intercourse acts, and other applicable laws. The Law of the River includes several U.S. Supreme Court decisions, two multi-state compacts, and numerous acts of Congress concerning the use of the Colorado River. We believe that uses of the Colorado River must be consistent with this body of law.

Title I clearly prohibits the direct or indirect marketing of CAP outside the boundaries of the State of Arizona. However, it would not impact the existing interstate banking agreements with California and Nevada through the Arizona Water Banking Authority. Nor would it affect any exchange necessary for the New Mexico Unit of the CAP as authorized in 1968. The State has been negotiating with the State of New Mexico over proposed changes to confirm that New Mexico can develop the CAP New Mexico Unit as envisioned in the 1968 Act.

Funding of tribal water settlements has been a problem in the past. Tribes are asked to give up potential large paper water rights in return for a reasonable water budget and the ability to make use of the water. Use of water involves development funds for on-reservation projects. As you know, the appropriations process is difficult and may continue to be so in the future.

Title I outlines the intended uses for the Lower Colorado River Basin Fund (Fund) over the next 40 years. The Fund consists of payments by the non-Indian CAP water users and power revenues of the CAP. These sources will continue to flow into the Fund until the CAP is fully repaid. Under Title I, the revenues in the Fund are redirected to be used to reduce the cost of delivery of water to tribal water users, to finance current and future tribal water settlements and to finance CAP distribution systems on tribal lands. It is important to note that this funding is for the long-range water and economic development needs of Indian tribes.

Other issues resolved in Title I include clarifying that CAP contracts, whether tribal or non-Indian, are for permanent service within the meaning of the Boulder Canyon Project Act and for a term of service of 100 years. It also resolves the long-standing dispute between the Secretary and CAWCD about how shortages will be shared by users of the CAP.

The provisions of Title I have been memorialized in the Arizona Water Settlement Agreement (Agreement), among the CAWCD, the Director of the Arizona Department of Water Resources, and the Secretary of the Interior. CAWCD and the Director signed the Agreement last year, but the Secretary will need to complete the National Environmental Policy Act process before signing. Finishing the Agreement will further the stipulated settlement of the repayment litigation in U.S. District Court, which could not be completed without passage of H.R.885.

Title II: Gila River Indian Community Water Rights Settlement

Coronado visited the Pima Indians of what is now central Arizona in 1540. There the conquistador bought grains from lush tribal fields along the Gila River. The current Gila River Indian Community (Community), made up of two tribes, the Pima and the Maricopa, are the descendents of those Indians visited so long ago by Spanish explorers and missionaries. These tribes assisted the U.S. Cavalry in the Indian wars, sold grain to American settlers, and its members have volunteered to serve in many overseas conflicts. One such member was Ira Hayes who helped raise the United States Flag over Iwo Jima.

With a history of farming they have fought in the courts for decades for their water rights. Over the last two decades negotiations have been held. In the last year we finally succeeded in reaching a settlement. Title II would authorize the Secretary to sign the Gila River Indian Community Water Rights Settlement and provide the ways and means needed to make it a reality.

The State participated in this settlement in many roles, that of facilitator, water rights holder, and protector of state policies and interests. Additionally, the State attempted to make the settlement acceptable for small water users unable to represent themselves in the negotiations. After enactment of the congressional settlement legislation, Arizona must address and enact changes to Arizona law consistent with the settlement to bind all citizens to the settlement, now and in the future. A State does not commit lightly to changing its laws, but in this case it will not only address issues presented by the settlement, but also serve the water management goals of the State. To this end the Arizona Department of Water Resources, the Arizona Game and Fish Commission and the Arizona State Land Department represented the State in negotiations. I will outline the State's policy considerations.

A major goal of any Indian water rights settlement is finality. Title II confirms an overall final water budget for the Gila River Indian Community and provides strict accounting of that budget, funding to allow utilization of the water, and broad waivers of claims by the Community and the United States as trustee to pending and future court claims to water rights.

In the General Stream Adjudication of the Gila River and its sources, the Community and the United States claim between 1.5 million and 2 million acre-feet of water from all sources. The Gila River bisects the Community, which has proven uses of Gila River and groundwater since before recorded history. It is not a matter of whether the Community is entitled to water; it is a question of how much.

In the settlement, the Community has agreed to an overall water budget of 653,500 acre-feet annually, calculated on a rolling average over 10 years. The sources of the water are Gila River water, Salt/Verde River water, groundwater, exchanged reclaimed water, and Central Arizona Project (CAP) water. Well over one-half of the proposed water budget is currently under the legal control of the Community. It has a CAP contract for 173,100 acre-feet, a time-immemorial right to over 200,000 acre-feet Gila River water under the Globe Equity decree (125,000 acre-feet of reliable water in the tribal water budget), 5,900 acre-feet of Salt/Verde River water under the Haggard Decree, and the sovereign right to pump their own groundwater outside of State regulation. Part of this settlement is recognition of rights already held and used by the Community, with methods to improve those existing uses. Attached to my statement is an outline of the Community settlement water budget.

The primary source of additional water for the Community's water budget is CAP, with some contributed Salt/Verde River water and exchanged reclaimed water. Some parties contribute CAP water, but the largest block is from the CAP sub-contract relinquishment pool established under Title I, approximately 102,000 acre-feet of lower priority water used for agriculture. The final piece to the water budget came from creative thinking by the Phoenix area cities. The cities of Mesa and Chandler will exchange highly treated reclaimed water with the Community for Community CAP water on a 5 to 4 ratio. This creative thinking solves several water management issues and benefits Indians and non-Indians. In fact, the two cities have already entered into the agreements necessary to make the exchange, beginning the construction process prior to enactment of this legislation. The Community and the United States are prohibited from seeking water above the proposed water budget.

In exchange for this water budget and funding to make use of the budget, the Community and the United States are granting broad waivers to all the citizens of Arizona of past, present, and future court actions on water rights, subject to some retention of rights to enforce the benefits of the settlement. Arizona insisted that this be a final settlement of the Community's claims to water.

A benefit to settlements is to make partners out of combatants. An example of this, to be confirmed in the settlement, is the relationship between the Gila River

Indian Community and the San Carlos Irrigation and Drainage District (SCIDD). SCIDD and the Community share in the San Carlos Indian Irrigation Project run by the Bureau of Indian Affairs. Sharing water of a project operated by an underfunded federal agency has strained the relationship. Through the settlement, SCIDD and the Community will enter into a new relationship, dividing the project features and taking over responsibility for operating their own systems. The settlement also provides funding to rehabilitate the existing unlined system to make better use of limited water supplies. SCIDD and the Community now share common goals and work together as a team. This is but one example of how this settlement is making neighbors out of antagonists.

I will, at this point, list the parties to separate agreements (settlement, exchange, lease, or otherwise) that are part of the overall Community settlement confirmed by H.R. 885. The parties are:

- The Salt River Project;
- Phelps Dodge Corporation;
- The irrigation districts and many towns and cities in the Upper Gila River Valley and the San Pedro River, including New Mexico rightholders;
- Arlington Canal Company and the Buckeye Irrigation Company;
- Maricopa-Stanfield Irrigation and Drainage District;
- Central Arizona Irrigation and Drainage District;
- San Carlos Irrigation and Drainage District;
- The Cities of Mesa and Chandler;
- Arizona Game and Fish Commission; and
- Phoenix area cities with leasing arrangements.

Some of these separate agreements further the water management goals of the State. For example, the ability of various cities to lease high-priority CAP water from the Community for 100 years is important in meeting Assured Water Supply requirements under state law for new subdivisions. The reclaimed water exchange agreements between the cities and the Community provide the Community with a reliable source of water for agriculture, and assist the cities in making full reuse of treated effluent.

The Upper Gila Valley settlements provide many benefits. Not only do the settlements end long-standing contentious litigation before the Globe Equity Court, between the large irrigation districts and the Community, but also provide a basis for future settlements. The irrigation districts have agreed to permanently reduce irrigation acreage for the benefit of the Community, and if there were a future settlement with the San Carlos Apaches, the districts would permanently reduce additional irrigation acreage. The irrigation districts have also agreed to a cap on combined diversions and groundwater pumping; real reductions in water use, to the benefit of the river's health, the Community, and the San Carlos Apache Tribe.

In past Indian settlements, States have been asked to make financial contributions to settlements. In previous Arizona Indian tribal water settlements, the State has provided an appropriation to the tribal development fund. The State's contribution to the Community settlement is structured differently. First, the State believes that the CAP water that is being relinquished is a state contribution. It was originally part of the non-Indian allocations of the CAP. We have agreed to this division of water in Title I and urge its use for the Community's settlement. The financial aspect for the State in this settlement may be large as time goes by, but it does not include any contribution to the Community development. Instead the State has agreed to firm up to 15,000 acre-feet of low-priority CAP water. Title I outlines this commitment but leaves the details to a future agreement with the Secretary about firming of tribal supplies Through the Arizona Water Banking Authority we are in the process of analyzing how this will be accomplished. It may involve millions of dollars to bank an amount necessary to firm the water to municipal and industrial delivery priority.

One of the separate agreements involves protection of groundwater in the areas south of the Gila River Indian Reservation. By changes to state law, the State will limit the use of groundwater in specific areas adjacent to the reservation to help protect tribal groundwater. To further ensure that the restrictions benefit the aquifer for the Community, the State will authorize and supply a water replenishment bank. The settlement outlines the goals of the replenishment bank but leaves implementation up to the Arizona Legislature. By enacting state legislation we will bind all future water users in that protected area to the settlement. This replenishment bank may involve millions of dollars.

Water uses in other areas within the Gila watershed are also of concern to the Community, including groundwater users along the San Pedro River and the Upper Gila River. The water budget makes assumptions about the present flow of the Gila and San Pedro rivers. The State has proposed that present uses on those streams

should be allowed to continue and the Community has agreed. The settlement proposes a “safe harbor” provision for these current uses that the Community, SCIDD and the United States would not challenge. To limit future uses, the State has agreed to propose changes in state law that prohibit the construction of new dams and the development of new irrigation uses within the San Pedro River and the Upper Gila River basins. When enacted the State assumes an ongoing enforcement responsibility. At this time we do not have an estimate of this future financial commitment.

To summarize: The State contributions involve several changes in state law to accomplish the goals of the settlement; obligate the State to ongoing enforcement provisions, and necessitate large underground water storage expenditures for firming of tribal water and for the replenishment bank.

This settlement encompasses many good things for many entities within Arizona. I have touched only on those of particular importance as State policy considerations. However, I must comment on one more provision. In Title II, and in Title III, the legislation outlines procedures for the Gila River Indian Community and the Tohono O’odham Nation to have lands placed into trust.

It is important to remember that 28 percent of Arizona’s total land base consists of various Indian Reservations, with much more land held in trust for benefit of tribes or individual Indians, or in fee by tribes. We are proud of our tribal governments and have improved our ability to work with them on a government-to-government basis, especially on health, education and gaming issues. However, there are many consequences to state and local non-Indian authorities when lands are added to reservations, or taken into trust. For many years the State has taken the position that only Congress has the authority to make new reservations or additions to existing reservations, pursuant to congressional directives found in 25 U.S.C. 211. Some tribes and the Secretary of the Interior disagree with our legal analysis. To circumvent future litigation on this issue we, along with other Arizona interests including the congressional delegation, have urged that the settling tribes agree to a clarification of this issue concerning their reservations.

Title II confirms that new additions to the reservation, or the placing of lands into trust status for the benefit of the Community, will only be accomplished by specific acts of Congress. Congress enacted the Zuni Indian Tribe Water Settlement Act earlier this year with similar provisions. We strongly support retention of this provision in Title II, as well as in Title III.

In summary, the Gila River Indian Community Tribal Water Settlement provides many benefits to all Arizonans, and the State has committed itself to changes in state law and future use of resources to effect the benefit of the settlement for the Community.

Title III: Amendments to the Southern Arizona Water Rights Settlement Act of 1982

In 1982, Congress enacted the Southern Arizona Water Rights Settlement Act (SAWRSA) to resolve the tribal claims against non-Indian water users in the Upper Santa Cruz Basin by the Tohono O’odham Nation (Nation), then known as the Papago Tribe, pending in the case U.S. v. Tucson. The 1982 SAWRSA called for a water budget of 66,000 acre-feet of delivered water, a 10,000 acre-feet limit on groundwater pumping by the Nation, a \$15 million development trust fund, and a cooperative fund to pay for the delivery of surface water.

Portions of the settlement have been completed, including the construction of a major portion of the distribution system to use the Nation’s original CAP allocation. The Nation, the State, and the local entities have performed their required tasks under the 1982 Act. This included state entities’ financial contributions of \$5.25 million, Tucson’s contribution of 28,200 acre-feet of effluent and tribal waivers of claims to water rights.

However, issues about the distribution of the tribal benefits arose before final dismissal of U.S. v. Tucson. At the same time, questions were raised about the source of a portion of the tribal water budget, and opposition formed to the building of a new farm on unbroken desert lands. Title III of H.R. 885 would amend the 1982 Act to address these issues, provide a better method for dismissal of the pending lawsuits, and modernize the authorized uses of water by the Nation to be more consistent with those allowed under state law. It also confirms the settlement agreement among the Nation, the State of Arizona, Asarco, an international mining company, and Farmers Investments Companies (FICO). I recently signed the settlement agreement, as have all parties except the Secretary of the Interior, who is awaiting congressional authorization.

To begin the more recent negotiations with all parties to the settlement, an agreement was reached between the Nation and the Indian allottees, whose allotment lands are within the basin, about the use of the settlement benefits. It is a tribute

to the tribal parties that they have worked out internal differences, and now are ready to finish the settlement. The State acted as a party to the final settlement and facilitated the negotiations.

Title III clarifies all the issues that delayed implementation. First, it identifies the source of the additional settlement water. The Nation has an original CAP allocation of 37,800 acre-feet, but SAWRSA provided for an additional 28,200 acre-feet of unidentified settlement water. Under Title I of H.R. 885, CAP agricultural water is made available to the Secretary for Indian water settlements, and it is from this pool of relinquished contracts that the Nation will receive its full settlement budget. Title I directs that the Secretary will have the responsibility to firm the 28,200 acre-feet of settlement water. The State offered up to \$3 million in appropriations or services to assist the Secretary in that obligation. It should be noted that the State had already appropriated a contribution to the Cooperative Fund, as required under the 1982 Act, and this \$3 million is an additional contribution.

The settlement better defines the nature of the 10,000 acre-foot limit on pumping rights. The 1982 congressional directive on the limitation of pumping did not address whether this is a "reserved" pumping right or the equivalency of a state-based grandfathered pumping right in an active management area. In return for clarifying that this is not a reserved right the State has agreed to seek state law changes to allow additional protection to the Nation's groundwater resource from the effects of new wells around the reservation. Under this legislative change, the State adds to its water management responsibilities in the Tucson Active Management Area.

Each of the major parties, the City of Tucson, Asarco, and FICO, have entered separate agreements with the Nation and the allottees to further protect the groundwater resource of the reservation. This includes a creative solution by Asarco to substitute tribal CAP water for Asarco's industrial groundwater use through a storage arrangement.

Waivers and releases under the 1982 Act only provided for past and present claims to water rights and injuries to water rights, while the Title III amendments include future claims to water rights and injuries to water rights with some defined exceptions to enable the parties to enforce the settlement provisions.

In 1982, it was envisioned that the Bureau of Reclamation would construct or rehabilitate three different farm units for the Nation. Under Title III, a procedure is outlined to substitute a \$18.3 million development fund for one farm that would have been built on unspoiled desert lands. The \$18.3 million is a present value substitute for a project already authorized as part of a settlement and committed to construction. Of the remaining commitment, one farm is already completed, and the last farm rehabilitation and expansion project has begun, both using CAP funding.

A procedure for dismissing the pending lawsuits is agreed upon in the settlement agreement, and confirmed by Title III. It provides for class action consolidation and dismissal of Indian allottee claims based on the receipt of settlement benefits. There are over 3,000 individual Indian allottees with land interests in the basin. The State finds that this procedure gives greater certainty, binding not just the present litigants but also their successors.

In summary, Title III provides better tools for dismissal of pending lawsuits, a confirmed supply of settlement water for the Nation, protection of tribal groundwater, creative uses of CAP water, and legal certainty over issues not addressed in 1982, such as the nature of the groundwater pumping right.

Title IV: San Carlos Apache Tribal Water Settlement

Unfortunately, at this time we do not have a San Carlos Apache tribal water settlement. Congress approved a San Carlos Apache Tribe water settlement of their claims to the Salt River watershed portion of the reservation in 1992. Since that time, several discussions have been about resolving the tribe's claims to the Gila River watershed portion of the reservation. These issues are also being addressed in the General Stream Adjudication of the Gila River and its source.

The State stands ready to assist in the negotiation of the San Carlos Apache tribal claims to the Gila River when the Tribe and the United States reach an understanding of the parameters of such a settlement. It is possible that a settlement will be reached before passage of H.R. 885. However, the State does not believe that the rest of legislation should be delayed if Title IV cannot be completed.

Provisions have been made in Title II to maintain the rights of the San Carlos Apache Tribe against the settling parties. The San Carlos Apache Tribe expressed concerns to the State that the legislation and the settlement agreement for the Gila River Indian Community hinder use of their current water rights. They cite primarily the exchange provisions in the Community's settlement, and the legislative changes proposed by the State of New Mexico, both in Title II. Under the Globe Equity decree of 1935 the Apaches were awarded a water right with an 1846 priority

date to irrigate 1,000 acres along the Gila River. The State fully supports maintaining the ability to use this right, and, in fact, would support proposals to enhance the ability of the Apaches to make use of the 1846 right.

The State is optimistic that the Apache claims to the Gila will be resolved in the not too distant future, either by settlement or in Adjudication Court, but urges the Committee to move forward on H.R. 885, with or without a new Apache settlement.

Summary and Conclusion

Before closing I would note that there are concerns that have been raised by non-parties to the settlements. Most notably the Navajo Nation, in its endeavor to quantify its water rights, has offered comments. Their primary concern is that the Navajo Nation claims have not been considered in this legislation. The State of Arizona is currently negotiating with the Navajo Nation about its claims to the mainstream Colorado River. It is our hope that a portion of the water acquired pursuant to the relinquishments authorized in Title I will be available for settling their claims.

Title I provides the final division of the Colorado River waters to be delivered through the CAP, clarifies contractual relationships with the United States, authorizes a shortage-sharing approach, and furthers the intent of the stipulated settlement between Central Arizona Water Conservation District and the United States on repayment of construction costs of the CAP. Presently unallocated CAP water is finally allocated or reallocated pursuant to public processes completed many years ago. Finally, Title I provides a mechanism for relinquishment of agricultural priority water to be used for Indian water settlements, both present and future, along with a funding mechanism for those settlements and for the delivery of CAP water to Indian customers. The funding mechanisms proposed through the Lower Colorado River Basin Fund may be unique, but they are worthy of congressional approval. These benefits accrue primarily to Arizona Indian tribes and their future economic development.

Title II confirms the water rights settlement of the Gila River Indian Community, ending long-standing judicial and cultural conflicts concerning millions of acre-feet of water. It provides the Community with a clear final water budget and the resources to utilize that water in return for complete waivers and releases of water rights claims and injuries to water rights. Many of the settlement's features enhance the ability to conserve groundwater in central Arizona, including the leasing of tribal CAP supplies to non-Indian users in Arizona. Title II resolves potential legal disputes over how non-tribal lands gain trust or reservation status by confirming that it is properly Congress' role to determine if and how reservations are changed. The State has committed to pursue changes in state law and to expend millions of dollars to assure the Community more reliable water supplies and to preserve groundwater on and around the reservation.

Title III provides means to finalize a settlement long overdue for the Tohono O'odham Nation and the people of southern Arizona. It modernizes the 1982 settlement, providing water use flexibility, especially of CAP water. In seeking additional protections of tribal groundwater, the settlement complements existing state water management goals. The effort in amending the settlement gave tribal, local, state, and federal government representatives an opportunity to better understand each other and to become partners instead of combatants.

We have worked long and hard to negotiate the three settlements represented by the respective Titles, and the State of Arizona strongly recommends that the Committee support H.R. 885, the Arizona Water Settlements Act of 2003.

February 4, 2003
Execution copy

4.0 COMMUNITY'S WATER RIGHTS

4.1 The Community and the United States shall have the following rights to water, which shall be held in trust by the United States on behalf of the Community:

<u>SOURCE</u>	<u>AMOUNT</u>	<u>REFERENCE</u>
Underground Water	156,700 AFY	as set forth in Paragraph 5.0
Globe Equity Decree Water	125,000 AFY	as set forth in Paragraph 6.0
Haggard Decree Water	5,900 AFY	as set forth in Paragraph 7.0
Community CAP Indian Priority Water	173,100 AFY	as set forth in Subparagraph 8.3.1
RWCD CAP Water	18,600 AFY	as set forth in Subparagraph 8.3.3
RWCD Surface Water	4,500 AFY	as set forth in the RWCD Agreement
HVID CAP Water	18,100 AFY	as set forth in Subparagraph 8.3.5
Asarco CAP Water ¹	17,000 AFY	as set forth in Subparagraph 8.3.4
SRP Stored Water ²	20,000 AFY	as set forth in Paragraph 12.0
Chandler Contributed Reclaimed Water	4,500 AFY	as set forth in Paragraph 18.0
Mesa Reclaimed Water Exchange Premium	5,870 AFY	as set forth in Paragraph 18.0
Chandler Reclaimed Water Exchange Premium	2,230 AFY	as set forth in Paragraph 18.0
New CAP NIA Priority Water	102,000 AFY	as set forth in Subparagraph 8.3.2
TOTAL	653,500 AFY	

¹ Subject to completion of ongoing negotiations between the Community and Asarco.

² SRP has conditionally agreed to provide an average of five hundred (500) AFY of Blue Ridge Stored Water to the Community pursuant to Subparagraph 12.13. In the event the conditions in Subparagraph 12.13.1 are satisfied, the amount of water listed in Subparagraph 4.1 to be provided by SRP shall increase to twenty thousand five hundred (20,500) AFY and the amount of Underground Water listed in Subparagraph 4.1 shall be reduced to one hundred fifty-six thousand two hundred (156,200) AFY.

[Mr. Guenther's response to questions submitted for the record follows:]

**Response to questions submitted for the record by Herbert R. Guenther,
Director, Arizona Department of Water Resources**

Congressman Hayworth's Question to the State of Arizona

It is my understanding that any party that holds a water right under the Globe Equity 59 Decree (G.E. 59 Decree) may engage in a transfer of that

right which involves a change in the point of diversion or manner or purpose of the use of such water. It is also my understanding that the authorization for such transfers is contained in Article XI of the Decree, which also requires that such transfers occur “without injury” to the rights of other parties that hold water rights recognized by the Decree.

Can you confirm that all water exchanges and transfers that involve G.E. 59 Decree water rights contemplated or authorized by the Arizona Water Rights Settlements Act will be subject to approval by the Globe Equity Court applying the standard contained in Article XI of the G.E. 59 Decree?

Answers

Concerning Congressman Hayworth’s understanding of Article XI of the Globe Equity 59 Decree and its application to transfers and exchanges we offer the following comments:

In an order dated September 23, 1993, rules were adopted by the Decree Court on sever and transfers or change of use of decreed rights, but did not address short-term or long-term exchanges. However, the Court has reviewed exchange proposals in the past couple of years due to the on-going drought.

In April of 2003 the Court approved an exchange of Central Arizona Project water for water retained in San Carlos reservoir. Here the San Carlos Apache Tribe had CAP water delivered to the San Carlos Indian Irrigation Project (SCIP) entities (San Carlos Irrigation and Drainage District and Gila River Indian Community) in exchange for retention of SCIP rights in the reservoir. The parties presented the Court with a stipulation.

To meet emergency water needs the Town of Kearny executed an exchange agreement with the Gila River Indian Community (GRIC) and the San Carlos Irrigation and Drainage District (SCIDD) for 2001–2002. Decree parties protested the exchange because it did not go through the 1993 rules. The Gila River Water Commissioner did not think the rule applied to a short-term exchange. After a briefing and a hearing the Judge decided on June 6, 2003, to allow the 2001–2002 exchange because there was no harm to other users, but did not grant it as a long-term exchange. After noting that the Kearny exchange was not a precedent, the Judge urged all parties to come to the Court with stipulated agreements for proposed exchanges. The Judge did not decide whether exchanges were authorized or consistent with Article XI of the Decree because that issue had not been briefed. However, in our opinion the Judge has clearly indicated that exchanges involving parties to the Decree such as GRIC and SCIDD should come before the Decree Court for approval under a no harm to other rightholders standard.

Concerning the specific question about the Arizona Water Settlements Act and its requirement of Globe Equity 59 Decree Court approval of transfers and exchanges we offer the following comments:

We believe the legislation does (pursuant to agreement of the parties) require the approval of the Globe Equity 59 Decree Court for many provisions. Exchanges and transfers are specifically part of the Arizona Water Settlements Act. Provisions of the Upper Valley Defendants (UVD) Settlement Agreement, Exhibit 26.2 relates to transfers; and the Phelps Dodge Agreement, Exhibit 10.1, relates to exchanges. Both of those agreements contain specific provisions for Globe Equity 59 Decree Court jurisdiction and approvals. See paragraphs 5.2, 11, 12.1, and 13.3 of the UVD Settlement Agreement, and paragraph 6.1 of the Phelps Dodge Agreement. Should an Asarco Agreement be reached, it is anticipated that it would also contain provisions about the Globe Equity 59 Decree Court, including any exchanges pursuant to CAP leases.

Related but not currently contained in the legislation are the amendments to be offered by the New Mexico congressional delegation. Under the 1968 Central Arizona Project Act (43 U.S.C. 1521 et seq) a New Mexico Unit of the CAP was authorized (§ 1524(f)). Gila River exchanges were specifically authorized and subject to a standard of “without injury or cost to the holders” of Globe Equity Decree rights to the Gila River. While approval of the exchange is not required under the 1968 Act, the Decree Court would probably be the forum for determination of any injury claims by rightholders. We believe the New Mexico amendments may be drafted to require Globe Equity 59 Decree Court approval of the proposed exchange agreement.

Mr. CALVERT. At this point, the Chair would recognize our friend from New Mexico, Mr. Lopez, to offer his testimony on H.R. 885.

**STATEMENT OF ESTEVAN R. LOPEZ, DIRECTOR,
NEW MEXICO INTERSTATE STREAM COMMISSION**

Mr. LOPEZ. Good morning, Mr. Chairman and Subcommittee members. My name is Estevan Lopez. I am the Director of the New Mexico Interstate Stream Commission. I appreciate very much the opportunity to appear before you today and provide comments on behalf of the State of New Mexico regarding the Arizona Water Settlement Act, H.R. 885. With your permission, I will submit my written testimony for the record.

This legislation will resolve longstanding water issues among Indian tribes and water users in New Mexico and Arizona. It is of great importance to the State of Arizona and will bring numerous benefits to water users in communities in the Gila River Basin. I want to commend you, Representative Hayworth, and Senator Kyl and other members of the Arizona delegation for such comprehensive and important legislation.

In addition to the benefits to Indian tribes and water users in Arizona, this bill could benefit Western New Mexico, which shares the Gila River with Arizona. Both Title I of the bill, the Central Arizona Project Settlement Act, and Title II, the Gila River Indian Community Water Rights Settlement Act, bear directly on use of water within the Gila River Basin in New Mexico.

During the last year, we have worked with representatives of the State of Arizona, Indian tribes, and water users to craft language that will address New Mexico's needs. We have made substantial progress, and if New Mexico's interests can be protected, we will be able to stand fully behind the bill.

New Mexico has two discrete areas of interest. First, in the Upper Valley Defendant, or UVD, agreement, approved in Title II of the bill, we want to ensure that New Mexico farmers in the Virden Valley are fairly treated. Second, the authorization for the New Mexico unit under Section 304 of the 1968 Act authorizing the Central Arizona Project must be fully protected in advance. I will discuss these two matters in turn.

Last year, my office and the New Mexico Office of the State Engineer participated in negotiating provisions of the UVD Agreement. The core agreement calls for the UVDs to reduce current irrigation by 3,000 acres in exchange for the ability to pump groundwater up to six acre feet per acre, regardless of priority. The result in New Mexico is that water rights associated with up to 240 acres, or approximately 8 percent of the current irrigated acres in the Virden Valley, would be extinguished. The State of New Mexico believes the UVD settlement in H.R. 885 is a fair and reasonable compromise that will protect all parties and provide a more secure and dependable water supply. We support implementing the UVD settlement.

Our second concern is to carry out the authorization for the New Mexico unit of the Central Arizona Project, or CAP, as provided in the 1968 Act. The 1964 U.S. Supreme Court decree in *Arizona v. California* limited the State of New Mexico to present and past uses of water with no water for future uses. The 1968 Act authorized an apportionment to New Mexico as part of the cap. The intent of the 1968 Act is to provide for future uses of water in New Mexico from the Gila River Basin above those specified in Arizona

v. California. The 1968 Act directs the Secretary of Interior to provide New Mexico with additional water through an exchange by which the Secretary would contract with water users in New Mexico for water from the Gila River Basin in amounts that will permit consumptive use of water not to exceed an annual average of 18,000 acre feet, including reservoir evaporation, over and above the consumptive uses provided in Article IV of the decree of Arizona v. California. To complete the exchange, the 1968 Act also directs the Secretary to deliver CAP water to users in Arizona in sufficient quantities to replace in full any diminution of their Gila River water supplies that results from the additional consumptive use of Gila River water in New Mexico. Amendments to H.R. 885 are required to ensure New Mexico's ability to construct the New Mexico unit and develop the 18,000 acre feet. Over the last 9 months, we have been working with the State of Arizona, the Bureau of Reclamation, the Bureau of Indian Affairs, the Gila River Indian Community, the San Carlos Irrigation and Drainage District, and the Central Arizona Water Conservation District to develop necessary amendments and related settlement documents to facilitate construction and operation of the New Mexico unit of the CAP. Attached to my written testimony is a summary of progress and remaining issues relating to the Arizona Water Settlement Act and the New Mexico unit of the Central Arizona Project, as jointly prepared by New Mexico and Arizona on September 23 of 2003. That summary outlines the issues and tasks that have been or remain to be resolved, in part or whole, between Arizona and New Mexico in relation to the 18,000 acre foot exchange.

Mr. Chairman, we are working tirelessly to finish our negotiations with the State of Arizona, Indian tribes, and other water users. Once those discussions are complete and resolutions of these issues can be incorporated into the legislation, we look forward to providing New Mexico's strong support for enactment of this bill by Congress.

Thank you again for the opportunity to present our views on this matter.

Mr. HAYWORTH. And, Mr. Lopez, we thank you.

[The prepared statement of Mr. Lopez follows:]

**Statement of Estevan R. López, Director,
New Mexico Interstate Stream Commission**

Mr. Chairman and Subcommittee members, I am Estevan López, Director of the New Mexico Interstate Stream Commission. I appreciate very much the opportunity to appear before you today and provide comments on behalf of the State of New Mexico regarding the Arizona Water Settlements Act, H.R. 885. This legislation will resolve long-standing water issues among Indian Tribes and water users in New Mexico and Arizona. It is of great importance to the State of Arizona and will bring numerous benefits to water users and communities in the Gila River Basin.

In addition to the benefits to Indian Tribes and water users in Arizona, this bill could benefit western New Mexico, which shares the Gila River with Arizona. Both Title I of the bill, the Central Arizona Project Settlement Act, and Title II, the Gila River Indian Community Water Rights Settlement Act, bear directly on use of water within the Gila River Basin in New Mexico.

During the last year, we have worked with representatives of the State of Arizona, Indian Tribes, and water users to craft language that will address New Mexico's needs. We have made substantial progress, and if New Mexico's interests can be protected we will be able to stand fully behind the bill.

At this time, I would like to give you a brief summary of New Mexico's interests in the legislation and the progress the two states and other parties have made in

addressing our concerns in the settlement documents and legislation. New Mexico has two discrete areas of interest. First, in the Upper Valley Defendant ("UVD") Agreement approved in Title II of the bill, we want to ensure that New Mexico farmers in the Virden Valley are treated fairly. Second, the authorization for a New Mexico unit under Section 304 of the 1968 Act authorizing the Central Arizona Project (43 U.S.C. 1543, Public Law 90-537) (the "1968 Act") must be fully protected and advanced. I will discuss these two matters in turn.

Last year, my office and the New Mexico Office of the State Engineer participated in negotiating provisions of the UVD Agreement. The core agreement calls upon the UVDs to reduce current irrigation by 3,000 acres in exchange for the ability to pump groundwater up to 6 acre-feet per acre regardless of priority. The result in New Mexico is that water rights associated with up to 240 acres, or approximately 8 percent of the currently irrigated acres in the Virden Valley, would be extinguished.

The State of New Mexico believes the UVD settlement in H.R. 885 is a fair and reasonable compromise that will protect all parties and provide a more secure and dependable water supply. We support implementing the UVD settlement.

Our second concern is to carry out the authorization for the New Mexico unit of the Central Arizona Project ("CAP") as provided in the 1968 Act.

In the U.S. Supreme Court litigation *Arizona v California*, 376 U.S. 340 (1964), the State of New Mexico presented evidence of present and past uses of water from its tributaries in the Lower Colorado River Basin including the Gila River and its tributaries. In addition, New Mexico presented a water supply study showing how the state could apply and use the water it claimed as its equitable share of the Gila River.

The report of the Special Master found that New Mexico should be allowed present uses as an equitable apportionment of the waters of the Gila River Basin, but did not make an apportionment of water to New Mexico for future uses from the Gila. The 1968 Act authorized an apportionment to New Mexico as part of the CAP. The intent of the 1968 Act is to provide for future uses of water in New Mexico from the Gila River Basin above those specified in *Arizona v California*.

The 1968 Act directs the Secretary of the Interior to provide New Mexico its additional water through an exchange by which the Secretary would contract with water users in New Mexico for water from the Gila River Basin in amounts that will permit consumptive use of water not to exceed an annual average of 18,000 acre-feet, including reservoir evaporation, over and above the consumptive uses provided for by Article IV of the decree in *Arizona v California*.

To complete the exchange, the 1968 Act also directs the Secretary to deliver CAP water to users in Arizona in sufficient quantities to replace in full any diminution of their Gila River water supply that results from the additional consumptive use of Gila River water in New Mexico.

Amendments to H.R. 885 are required to ensure New Mexico's ability to construct the New Mexico unit and develop the 18,000 acre-feet. Over the last nine months, we have been working with the State of Arizona, the Bureau of Reclamation, the Bureau of Indian Affairs, the Gila River Indian Community, the San Carlos Irrigation and Drainage District, and the Central Arizona Water Conservation District to develop necessary amendments and related settlement documents to facilitate construction and operation of the New Mexico unit of the CAP.

I will briefly note the issues under discussion and the progress being made. The issues are more fully described in the attached "Summary of Progress and Remaining Issues Relating to the Arizona Water Settlements Act and the New Mexico Unit of the Central Arizona Project," as jointly prepared by New Mexico and Arizona on September 23, 2003. The following issues and tasks have been or remain to be resolved, in part or whole, between Arizona and New Mexico in relation to the 18,000 acre-feet exchange:

1. New Mexico's initial concern was that the Arizona Water Settlements Act would prohibit the exchange of CAP water for New Mexico's additional diversion of Gila River water. This issue is resolved;
2. Progress is being made towards agreement on terms and conditions that will be incorporated into the exchange agreement between New Mexico, the Gila River Indian Community, and the Secretary of the Interior to effect the exchange provided in the 1968 Act;
3. All parties are working to develop acceptable operational parameters that will allow New Mexico to divert water without causing economic injury or harm to holders of senior downstream water rights. General concepts have been proposed and technical review is scheduled. We are working hard to resolve this difficult and complex issue;

4. Globe Equity constraints may serve to contravene the intent of the 1968 Act to provide additional consumptive uses in New Mexico. Work is ongoing related to the following Globe Equity issues:
 - a. To keep UVD users whole, accounting of storage in San Carlos Reservoir must include any water diverted by the New Mexico unit; and
 - b. The ability of New Mexico to exchange without regard to the 1924 federal storage priority in San Carlos Reservoir, as was assumed in Reclamation's 1982 and 1987 studies, must be confirmed;
5. As originally contemplated in the 1968 Act, funding for the New Mexico unit is authorized as part of the CAP. While the original New Mexico project cost estimate was approximately seventy million dollars, that estimate inflated according to the Consumer Price Index results in a cost total of over three hundred million in today's dollars. However, we believe we can build a suitable project for approximately two hundred twenty million dollars, including increased costs to accommodate federal environmental mandates.

In the settlement, New Mexico has proposed and Arizona is considering one hundred fifty million dollars in funding for the New Mexico unit that would be integrated with the funding provided for other projects under the Arizona Water Settlements Act. Discussions are ongoing regarding what costs would be supported. Under this proposal, New Mexico would have to make provision for at least seventy million dollars in construction costs plus substantial annual costs; and

6. Several entities are seeking to exchange Gila River water for CAP water, a situation that could result in shortages of available Gila River water in some years. New Mexico has the senior exchange priority emanating from the 1968 Act. However, in the spirit of compromise, New Mexico has offered to share priorities up to a set amount of aggregate exchanges. Discussions and studies are under way to determine the amount of exchanges with which New Mexico would share priority.

Mr. Chairman, we are working tirelessly to finish our negotiations with the State of Arizona, Indian Tribes and other water users. Once those discussions are complete and resolution of these issues can be incorporated into this legislation, we look forward to providing New Mexico's strong support for enactment of this bill by Congress. Thank you again for the opportunity to present our views on this matter.

ATTACHMENT TO STATEMENT OF ESTEVAN R. LÓPEZ

NEW MEXICO AND ARIZONA DEPARTMENT OF WATER RESOURCES SUMMARY OF PROGRESS AND REMAINING ISSUES RELATING TO THE ARIZONA WATER RIGHTS SETTLEMENT ACT AND THE NEW MEXICO UNIT OF THE CENTRAL ARIZONA PROJECT, SEPTEMBER 23, 2003

The following issues and tasks have or remain to be resolved, in part or whole, between Arizona and New Mexico in relation to the Gila 18,000 acre-feet exchange:

1. Effect of the Arizona Water Rights Settlement Act on the provision in the 1968 Colorado River Basin Project Act that provides for exchange of 18,000 acre-feet of Central Arizona Project water for a like amount of Gila River water consumptively used in NM. The concern was that the Arizona Water Rights Settlement Act could directly or indirectly impair New Mexico's ability to realize the benefits of the 1968 Act. Resolved in current proposed amendments.

2. Exchange agreements between New Mexico, Gila River Indian Community, and Secretary of the Interior to effect the 1968 exchange. Progress is being made to agree on terms and conditions to be incorporated in the exchange agreement.

3. Operational parameters for the New Mexico Unit. All parties, New Mexico, Arizona, Gila River Indian Community, and Reclamation, are working to develop operational parameters that will define how and when the New Mexico project diversion may occur without creating economic injury and harm to downstream senior Gila water users, including effects on groundwater users. General concepts have been proposed and technical review is scheduled. Resolution is hoped.

4. Globe Equity issues. Work is ongoing related to these issues:
 - a. Under the Globe Equity, water users above San Carlos Reservoir are permitted to divert Gila River water out of priority in an amount equal to water stored in San Carlos Reservoir. A New Mexico project would reduce the amount of out of priority diversion permitted. To keep Arizona water users whole, an adjustment is required to Globe equity accounting of San Carlos storage to include any water diverted by the New Mexico feature; and

- b. In the Globe Equity, San Carlos has a 1924 storage priority. This was assumed not to pose an obstacle in Reclamation's 1982 or 1987 studies of potential New Mexico projects. Changes are needed to clarify the ability of New Mexico to exchange as intended in the 1968 Act.

5. Funding. New Mexico has estimated current project costs could exceed \$220M. New Mexico has proposed and Arizona is considering that funding for the New Mexico unit be integrated with the funding provided for other projects under the Arizona Water Rights Settlement Act. Discussions are ongoing regarding what costs would be supported under this provision.

6. Exchange priority. The desires of various Arizona entities to enter into exchange agreements of Gila River water for Central Arizona Project water presents problems when water supplies are low. In one out of two years, there will not be enough Gila River water to supply all contemplated exchanges. New Mexico has the senior 1968 exchange priority in the 1968 Colorado River Basin Project Act but has offered to share priorities up to a set amount of exchanges. Discussions and studies are under way to determine the amount of exchanges with which New Mexico would share priority.

Mr. HAYWORTH. Of course, transcending the border of the States of Arizona and New Mexico, the presence of the Sovereign Navajo Nation. Before I recognize the witness here to testify on behalf of President Joe Shirley, let me apologize to those assembled. A scheduling dilemma has me having to leave the dais, but the very capable Vice Chairman of the Committee, my colleague from Arizona, will be taking the chair. But it is my privilege to recognize Stanley Pollack, Legal Counsel who is here representing Navajo Nation President Joe Shirley, with his testimony. Mr. Pollack, your testimony, please, sir.

STATEMENT OF STANLEY POLLACK, NAVAJO NATION

Mr. POLLACK. Thank you very much, Congressman Hayworth, and thank you very much for affording the opportunity to the Navajo Nation to testify on this important piece of legislation and affording me the opportunity to sit in for President Shirley, who sends his regrets. My name is Stanley Pollack. I am the water rights counsel for the Navajo Nation from the Navajo Nation's Department of Justice.

Again, we want to thank the Committee for addressing this important issue for the State of Arizona and Indian tribes in the State of Arizona. The Navajo Nation certainly appreciates the importance of water. We understand this importance, particularly since almost half of the homes on the Navajo reservation lack a reliable supply of domestic water. Almost half the homes on the Navajo reservation have to haul water from distant sources in order to have a basic supply of potable water. Thus, the Navajo people do not take water for granted and we support the efforts of the Gila River Indian Community to settle their water rights claims.

Despite this support, however, there are various aspects of H.R. 885 that are troubling to the Navajo Nation and our concerns are summarized and set forth in our written testimony. Very briefly, we discuss in the written testimony about how a huge amount of Central Arizona Project water will go toward the settlement for the Gila River Indian Community. The Navajo Nation does not begrudge the fact that the Gila River Indian Community is entitled to a very large quantity of water and we do not hold that against the Community.

Our concern, however, is that the Secretary of Interior, by utilizing the vast resources of Colorado River water to settle Central Arizona water rights matters for tribes in Central Arizona may be without the resources necessary to settle the Navajo claims on the Colorado River directly. So we want the Department to be mindful of the potential conflict that may arise when it is time to settle the Navajo claim.

Second of all, there is a piece of water in the settlement with the Gila River Indian Community that relies on water from Blue Ridge Reservoir, and again in our testimony we outline now the Navajo Nation considers water from Blue Ridge Reservoir, which is in the Little Colorado Basin where the Navajo Nation is located, to be claimed by the Navajo Nation. Again, this is an issue—we don't begrudge the Gila River Indian Community for seeking in their water budget and we are confident that we will be able to sit down with the Community and work out our concern.

But the most critical issue that we have with the particular legislation is Section 104(b). In that particular provision, the Secretary's hands are tied by requiring that water rights settlements—I am sorry, that the reallocation of CAP water to an Indian tribe in Arizona can only occur through a Congressionally approved water rights settlement. This is a problem for the Navajo Nation, because we need Central Arizona Project water today.

The community of Window Rock, Arizona, where I live, where I work, needs a supplemental water supply of drinking water. Although the community is located in Arizona, the best source of providing potable water to Window Rock comes from the San Juan River in New Mexico.

The Navajo Nation is actually very close to a settlement with the State of New Mexico concerning its water rights claims to the San Juan River. The centerpiece of that particular settlement would be the construction of the Navajo-Gallup Project, which would bring water to Gallup, New Mexico, and to Navajo communities in Western New Mexico. But Window Rock is on the border of New Mexico and Arizona and the best way to get Window Rock water is through the Navajo-Gallup Project.

The Navajo Nation needs approximately 6,400 acre feet of water for that Arizona piece of the project. We need an Arizona allocation. We have sought a Central Arizona Project allocation of 6,400 acre feet. We hope to introduce settlement legislation as early as January of next year that would authorize this particular settlement and this particular project, the Navajo-Gallup Project.

We can't afford to wait to settle all of the claims we have with the State of Arizona, which includes the claims in the Little Colorado River and the Colorado River mainstem, in order to have a final settlement that could get us CAP reallocation under Section 104(b). Thus, Section 104(b) of H.R. 885 makes it impossible for the Secretary to allocate much-needed drinking water for the community of Window Rock.

We can't afford the wait, again, for the settlement of our Arizona claims, so we need that water now. We are presently engaged in discussions with the State of Arizona, with the Department of Interior, and with the Gila River Indian Community to try to resolve these claims. We are confident that at the end of the day, we will

all be there and we will be in support of this particular piece of legislation.

Thank you for the opportunity to testify.

Mr. RENZI. [Presiding.] I thank the gentleman.

[The prepared statement of Mr. Shirley follows:]

Statement of Joe Shirley, Jr., President, Navajo Nation, on H.R. 885

Chairman Calvert and Members of the Subcommittee:

I am President Joe Shirley of the Navajo Nation. Thank you for the opportunity to provide testimony before the Committee regarding the Navajo Nation's views on the proposed settlement for the Gila River Indian Community to be implemented by H.R. 885 entitled the "Arizona Water Settlements Act." The proposed settlement will have a tremendous impact on the ability of the United States to supply the Navajo Nation with the water supplies needed to transform the Navajo Reservation into the permanent homeland envisioned when the Reservation was established. I ask the Committee to consider those impacts before recommending the approval of the proposed settlement. Working together, we are confident that the Gila River settlement can be crafted in a way that will not adversely affect the ability of the Navajo Nation to obtain the water supplies so desperately needed on the Navajo Reservation.

Let me begin by saying that the Navajo Nation greatly appreciates the tremendous effort that the Arizona Congressional Delegation has devoted to addressing the difficult water issues that confront the State of Arizona. Nothing is more important to the long-term welfare of the State than developing a reliable supply of water to meet the needs of all of the State's citizens, Indian and non-Indian alike. That cannot be done while the water rights of the Indian tribes in the State remain uncertain and cloud the rights of other water users without providing the tribes with the water that they so desperately need. We know that Congress is working hard to find fair and equitable solutions to these difficult problems, and the Navajo Nation wishes to work with you to find a way to address these issues in a way that also meets the long-term needs of the Navajo Nation.

The Navajo Nation is not a party to the proposed Gila River agreement nor were we invited to participate in the settlement discussions. Having reviewed H.R. 885 and the settlement that it would implement, however, it is apparent that there are at least two aspects of the proposed settlement for the Gila River Indian Community that involve water resources that are critical to the Navajo Nation. Both of these issues are matters of utmost importance to the Navajo Nation. In addition, the legislation represents an enormous federal investment in providing water supplies to the State of Arizona. We want to be certain that the present legislation does not preclude devoting further resources towards solving the difficult water supply issues facing the Navajo Nation and its neighbors in rural Arizona and New Mexico.

First, Section 104 of H.R. 885 reallocates 197,500 acre-feet per year of agricultural water priority water from the Central Arizona Project ("CAP") for use by Arizona Indian tribes. The bill proposes to transfer to the Gila River Indian Community 102,000 acre-feet of that supply. In addition, Section 104 prohibits the reallocation of any of the supply to an Indian tribe in absence of an Indian water rights settlement that calls for such a reallocation. Moreover, the water in question is "agricultural priority" water which has an extremely limited reliability. Under the provisions Section 105 of the bill, only 17,448 acre-feet of that supply is firmed up so that it can be used for municipal and industrial purposes by the other tribes in Arizona for municipal and industrial purposes. In contrast, Section 104 (b) reallocates 65,647 acre-feet of the far more valuable municipal and industrial priority water to non-Indian towns and cities in Arizona.

The Navajo Nation is deeply concerned about these provisions. While we have worked hard over the last two decades to resolve the Nation's claims to water throughout Arizona and New Mexico, we have outstanding needs for water that cannot be put aside during the years that will be required to achieve an overall settlement of the Nation's claims in those states. We do not believe that water required to meet the everyday needs of tribal members should be held hostage until those settlements are completed. Nor do we believe that the water provided under the provisions of Sections 104 and 105 is adequate to meet the needs—or the outstanding claims—of the Navajo Nation.

For example, it is clear that water from the mainstream of the Colorado River in the Lower Basin is essential to meeting the long-term needs of the Navajo Nation on its Reservation, yet the extent of the Nation's mainstream rights has never been seriously addressed, let alone determined. The residents of western portion of the

Navajo Reservation lack reliable water supplies and commonly are forced to haul water to meet their everyday needs. As a result of these critical and immediate needs, the Navajo Nation recently brought suit against the Secretary of the Interior to redress the United States' failure to obtain and protect a water supply for the benefit of the Nation from the Lower Basin of the Colorado River. While we recognize that this litigation poses a threat to various Colorado River programs that are critical to all of the basin states, the continued neglect of Navajo interests left us no choice but to proceed with our claims in court.

The Arizona portion of the Navajo-Gallup Project is another example of the efforts underway to address the immediate drinking water needs of the Navajo Nation's members. That project would be the centerpiece of a settlement of the Navajo Nation's water rights claims to the San Juan River rights in New Mexico. The Navajo Nation and the State of New Mexico are close to a final settlement agreement and hope to introduce settlement legislation as early as next year. However, the most troublesome issue is identifying a supply of water for the Navajo-Gallup Project to serve the water-short community of Window Rock in Arizona. A CAP allocation may be necessary for use in Arizona through the Navajo-Gallup Project, but H.R. 885 would prohibit the Secretary from allocating that water supply in the absence of a water rights settlement in Arizona. The Navajo communities to be served by the project have an immediate need for additional drinking water and cannot wait for the resolution of the Navajo claims in Arizona.

Ultimately, the nature and extent of the Nation's water rights in Arizona must be resolved if there is to be any certainty with regard to the CAP water supply and for the Indian communities that rely on this supply. If, in fact, the Gila River settlement eliminates or substantially reduces the availability of CAP water for other tribal water rights settlements in Arizona, the United States and the State, in all likelihood, will not have sufficient Colorado River resources to facilitate a Navajo mainstream settlement without taking water away from existing users. In short, we ask that you do not fully obligate CAP allocations in accordance with the terms of this bill, given the Navajo Nation's outstanding needs. The failure to recognize those needs and to obtain and protect a water supply sufficient to meet those needs will only lead to further controversy and disruption in the future.

Second, Section 12.14 of the proposed settlement describes a water budget for the Gila River Indian Community that includes a supply of water from Blue Ridge Reservoir, which is located on Clear Creek, a tributary of the Little Colorado River. The need for water from Blue Ridge to provide drinking water for water-short communities in the southern portion of the Navajo Reservation through the Three Canyon Project is now being studied by the Bureau of Reclamation in an ongoing study which Senator Kyl has sponsored. The Navajo Nation has always viewed Blue Ridge Reservoir as the cornerstone of any settlement of the Navajo rights in the Little Colorado River Basin because it is the only practical way to provide renewable surface water supplies to meet the domestic water needs of reservation communities in the vicinity of Leupp. As a result, the suggestion that Blue Ridge Reservoir provide a water supply for the Gila River settlement jeopardizes the contemplated Little Colorado River settlement to the detriment of everyone in the Basin. It is also important to point out that the water supply for Blue Ridge Reservoir is subject to the claims of the Navajo Nation in the Little Colorado River Adjudication, even if a portion of that water were to be provided to the Gila River Indian Community. In the absence of a settlement of the Navajo claims on the Little Colorado River, the Navajo Nation will have no alternative other than to pursue its claims to such water in the ongoing adjudication.

Third, this is a very substantial settlement. It provides the Gila River Indian Community with a water budget of 653,500 acre-feet of water and a hefty amount federal funds. Moreover, it permits the leasing of subsidized settlement water supplies from the community to non-Indian water users in central Arizona with no reimbursement to the United States for the capital costs of CAP. Far more troubling, however, are the benefits extended to non-Indian water users by the settlement. For example, Section 106(b) in conjunction with Section 107 appears to render non-reimbursable \$73,561,337 of debt incurred by CAP agricultural water users in Arizona under Section 9(d) of the Act of August 4, 1939. We fail to see the justification for such waivers. Moreover, we understand that other non-Indian water users are waiting in the wings to take advantage of the unique and expensive funding mechanisms provided by the legislation. Whatever the merits of the funding mechanisms in the bill, the benefits of those procedures should be reserved for Indian water right settlements or the provision of much-needed water supplies to tribal communities.

In closing, the Navajo Nation understands the significance of proposed Gila River settlement for the Gila River Indian Community and the State of Arizona. Unfortunately, the settlement as currently proposed jeopardizes the ability to resolve the

critical issues facing Arizona, the United States and the Navajo Nation. The Navajo Nation wants to work with Congress, the Arizona Delegation, the State of Arizona and the other parties to the proposed Gila River settlement to address these concerns so that the proposed settlement may move forward promptly. Thank you for the opportunity to testify on this matter of great importance to the Navajo Nation.

Mr. RENZI. Before we move to members' 5-minute questions, I want to recognize a gentleman here today, a great young leader of the Yavapai Apache, Mr. Jamie Fullmer. If you could stand, please, and be recognized, I appreciate you being here and coming today. I am grateful. Your written testimony and concerns have been written for the record.

Mr. RENZI. We are going to move now to the gentlelady from California.

Mrs. NAPOLITANO. I wish I had all day. I have got a ton of questions for a lot of people.

Essentially, Governor Narcia, one of the things that I have noticed in your report, that you say—on page 11, actually, of the bill—your testimony, rather—that this bill is partial compensation, on page 11, for water taken from the Community. Do you anticipate a need for future compensation legislation?

Mr. NARCIA. Mr. Chair, Congresswoman Napolitano, I will defer to our chief negotiator, Mr. Rod Lewis, to answer that question.

Mrs. NAPOLITANO. Thank you.

Mr. LEWIS. Mr. Chair and Congressman Napolitano, the Gila River Indian Community is located in Central Arizona just immediately south of Phoenix. The Gila River flows directly through the reservation and the Salt River is immediately adjacent to the reservation.

We have great claims to waters of both the Gila River and the Salt River. Unfortunately for the Gila River Indian Community, both those rivers have been diverted above us. We are downstream from most people here at the table and people upstream divert our water, we think illegally and in violation not only of the Gila Decree, but of our winter's rights claims that we have to both the Salt River and the Gila River.

So that is the basis for the statement that we have been deprived and have lost water, because throughout the years, since settlers came West and settled upstream from us. However, this legislation will correct that situation by providing us wet water and in return providing certainty and stability for the entire State of Arizona with respect to a water supply.

Mrs. NAPOLITANO. So the answer is yes?

Mr. LEWIS. Yes.

Mrs. NAPOLITANO. Thank you. Governor Narcia, then under this bill, H.R. 885, how much water will be used on your reservation and how much do you anticipate might be sold to non-Indian customers?

Mr. NARCIA. The Community has federally approved plans to use all the water provided there by the Settlement Act. Certain water leases are included in the settlement framework. Other than the settlement leases, the Community plans on putting all of our water to use. We are farmers. We have always been farmers. We will continue to be farmers. We don't plan to sell any of our water. We want to use it all.

Mrs. NAPOLITANO. Or lease it out. OK. Thank you.

To Chairman Seyler, Mr. Hickok of BPA expressed a willingness to reconvene discussions with the Spokane Tribe. Do you think the discussions would be fruitful, and do you share his interest in meeting with intent to reach agreement between both?

Mr. SEYLER. We have been trying to reach an agreement for 60 years. We are still willing to negotiate.

Mrs. NAPOLITANO. OK.

Mr. SEYLER. We would hope that BPA understands the term of negotiation and that it moves away from a "take it or leave it" offer.

Mrs. NAPOLITANO. Thank you. Mr. Lopez, if New Mexico develops more water as you describe in your testimony, how will that affect the San Carlos Apache Tribe downstream?

Mr. LOPEZ. Representative, it is our intent, as part of the continuing negotiation on amendments that we feel are still needed, to make sure that we can reach agreement on describing under what parameters New Mexico would be authorized to divert water from the river in such a way that would assure that downstream users would not be harmed or economically injured.

Mrs. NAPOLITANO. Mr. Chair, I will forego right now, but I want to make just one statement, that I think that all of the tribes that have been at the table may not have been getting a fair shake. If I have listened to the testimony from Kathy Kitcheyan in regard to the smallness of their ability to have friends in Congress—you have friends in Congress, ma'am. I would like to pass on, and my next round of questions is going to deal with many of the other issues I have in mind. Thank you.

Mr. RENZI. I thank the gentlelady.

I am going to move to the gentleman from Southern Arizona.

Mr. GRIJALVA. Thank you, Mr. Chairman. I have just some comments and questions, and one question in particular that comes to mind, and maybe that is a question for the Governor or Chairwoman Saunders, either/or, or both. Can you explain to me how the communities will be protected from environmental risk if Congress enacts the waiver that is included in this piece of legislation?

Mr. NARCIA. Congressman Grijalva, like other Indian water settlements, H.R. 885 specifies that the United States will bring certain types of claims either to acquire additional water rights or to constrain the activities of those parties that are incorporated in the settlement framework.

With respect to this particular agreement, the Community has agreed that the United States should be bound to the settlement framework in this manner. However, we also believe that the United States is only binding itself in its capacity as trustees for the Community and its members. In other words, in a situation where a claim could be made based on environmental or other laws for a non-Indian citizen or entity, the United States is still free to assert that claim on behalf of a member of the Community. The United States is only being asked to waive its ability to bring those unique claims that could be brought on behalf of an Indian tribe, an Indian citizen, an allottee, or any other Indian tribal member, but not on behalf of a similarly situated non-Indian.

Mr. GRIJALVA. Thank you.

Ms. JUAN-SAUNDERS. Congressman Grijalva, the Tohono O'odham Nation didn't waive water quality claims and we feel that that is a critical issue for our nation, and it is important not just for us but the other water users in Southern Arizona. I just want to conclude by saying that this was a very important piece of negotiations for all parties. Coming to the table wasn't easy for all parties, but we reached compromise and we are here today and this is a very significant event for the Nation and we ask for support. Thank you.

Mr. GRIJALVA. Thank you. Mr. Chairman, just an observation and a comment in following up on the Chairwoman's last statement. The process of good faith compromising and good faith negotiations is a difficult process for anyone involved in it, but I really feel that there are unresolved issues, issues that seem to be moving forward with regard to New Mexico and Arizona. I look forward to that. Issues that need to be dealt with with that Navajo Nation, and my fond hope that issues relative to San Carlos and the Apache Nation are also dealt with in that process of good faith negotiating.

As the Chairwoman said, it is difficult, and I know it was difficult for all parties and particularly for the nations to come to the table on this discussion, but I want to extend my appreciation and admiration, because the process is a difficult one, to bring it to this point. If the history of this process, being that it is done in good faith and among equals, continues, I will certainly continue to support the legislation. Thank you.

Mr. RENZI. I thank the gentleman.

I take my privilege and ask a few questions and then we will go for a second round if that is OK. Well, let us go to Mrs. Napolitano, with a great Italian name.

Mrs. NAPOLITANO. Thank you. I just wanted to say to Mr. Guenther to give my regards to the Governor, whom I have never had the pleasure of meeting.

[Laughter.]

Mrs. NAPOLITANO. There was an article on myself when I first got elected to Congress with her picture and we have laughed about that, which I found rather interesting.

I hear a lot of—thank you, sir. I hear a lot of concern about how this government has not really come to the table with all the parties equitably or in an expedient manner or in a fair manner, and that bothers me, because for many years—since I have been in government, since I have been in public office, I have found that sometimes only the squeaky wheel gets the oil—that is to say, those that can afford to be represented or have information about how to come to the table and what to say and what to do sometimes get supported and get the ability to get some of their legislation through or assistance in matters that are important to the people we represent.

I am very concerned about what I hear with Ms. Kitcheyan with the issues involved with the San Carlos Apaches and also with the Navajos. To say that you do not—that you have to cart in water to half your people is unconscionable for us in this day and age.

I would like to ask Ms. Kitcheyan, there is apparently pooled water behind the dam. Will this be destroyed by the agreement, and are there sacred cemeteries that will be destroyed?

Ms. KITCHHEYAN. Madam, I will answer your second question and I will defer to an attorney on the first question. There are graves underneath Coolidge Dam of our ancestors, and if it dries up, I fear that those spirits will come out.

And on your first question, I am going to defer to our attorney.

Mrs. NAPOLITANO. Would you identify your name for the record, please, sir?

Mr. SPARKS. Mr. Chairman, Congressman Napolitano, my name is Joe Sparks. I am Special Counsel to the San Carlos Apache Tribe.

As to the pool behind the San Carlos Dam, that pool of water was purchased as a CAP water exchange by San Carlos, for which it paid \$66 an acre foot. The diversions of water upstream, both in violation of the decree and new diversions that would be authorized by this Act, will diminish the flow of the Gila River to the lake and make it less likely that the natural flow will go through the lake, less likely that it will be replenished, and less likely that San Carlos Apache will be able to implement its existing 1992 settlement by exchange of water in San Carlos Lake. So all of those things are exacerbated by the anticipation of this legislation.

Mrs. NAPOLITANO. What would be a better compromise? What would help not dry up that pool?

Mr. SPARKS. We have been fighting for decades to get a natural flow of decent quality water from the headwaters of the Gila Mountains to and through Coolidge Dam so that the entire stretch or reach of the river can be fresh enough for San Carlos to use. But at the moment, the water is of such a poor quality that it kills the crops, it ruins the land, and there is an injunction by the Federal court ordering that the water quality be improved to San Carlos Apache to a point where they can grow moderately salt-sensitive crops. But that has not occurred. The river dries up because it is pumped upstream and does not come to San Carlos.

Mrs. NAPOLITANO. Do the requirements of the river for pumping include sufficient water for that pond?

Mr. SPARKS. No, it doesn't.

Mrs. NAPOLITANO. Has the Department of Interior or any agency looked at ameliorating the issue of water quality, in other words, setting up a plant to be able to treat the water so that it can be utilized?

Mr. SPARKS. If they have, it is a well-guarded secret. The answer, to our knowledge, is no.

Mrs. NAPOLITANO. Thank you. You have answered the questions. I will go for another round after you are done.

Mr. RENZI. OK. Thank you.

Ms. KITCHHEYAN. Congressman Renzi, may I add something to that—

Mr. RENZI. Yes, ma'am, please.

Ms. KITCHHEYAN [continuing]. For the Congresswoman? Please?

Mr. RENZI. Please.

Ms. KITCHHEYAN. Because of the quality of the Gila River that runs through our reservation, we have experienced a lot of birth

defects, cleft palates, also a lot of cancer, breast cancer, and I can attest to that because my son was born with a cleft palate. My daughter was born deaf in one ear, what you call a cauliflower ear. And I just wanted you to know that. Thank you.

Mrs. NAPOLITANO. Have there been any studies by any of the universities to affirm that the issue may be the water?

Ms. KITCHEYAN. In the past, Indian Health Service has started, but have left the research of it.

Mrs. NAPOLITANO. Is there a possibility, then, that part of the amendments to this water bill maybe will address the issue of water quality?

Ms. KITCHEYAN. I would like to see that, ma'am.

Mrs. NAPOLITANO. Thank you.

Ms. KITCHEYAN. Thank you.

Mr. RENZI. I thank the gentlelady.

I just have a few questions I want to help flesh out here before we go back to a third round, if the gentlelady would like to.

Mrs. NAPOLITANO. I would.

Mr. RENZI. OK. I want to stay on the idea of talking about the pool of water behind the dam. I personally have fished the lake and know firsthand the reliance the San Carlos Tribe has on the tourism, the fees, and the prosperity of that pool of water that we made.

When we talk about getting wet water to that lake and the idea that the Upper Valley users are using at a level that causes the water not to flow all the way down to the lake, part of the problem also is, knowing the area and being from my district, that we have got salt cedars that just clog the river bed to the point where it contributes to the high sodium levels and possibly to some of the impacts that we have been hearing today.

Have we had an opportunity at all to look at the alternative of how we would actually physically get wet water there—I mean, realistically get water to the pool and the idea that the offer from Governor Narcia of the pipeline? Are there any thoughts, Joe or Kathy, on that?

Ms. KITCHEYAN. Congressman, I would like to have Joe answer that, please.

Mr. SPARKS. Congressman Renzi, Mr. Chairman, thank you for providing that to us and we have evaluated it. Let me explain that it proposes to deliver the Globe Equity water that the San Carlos Apache is entitled to by developing a well field next to the reservation at Goodwin Wash, which would then provide underground water to the pipeline and deliver it to the reservation boundary.

That has two problems. One is that it certainly is a good faith suggestion by Governor Narcia. That is not a problem. The problem is that it further diminishes the water flow of the Gila River and further degrades the quality of the natural flow. It also does not comply with the Creed, because the court has ruled specifically, and it has been appealed to the Ninth Circuit and confirmed, that San Carlos Apache is entitled to the natural flow of the Gila River and, therefore, that isn't a practical way to comply with the decree.

Mr. RENZI. Joe, are we going to be able to get the river, honestly, and I am grateful for the articulation you are teaching me—are we ever going to really be able to get the river to the point where we

could run it all the way from New Mexico through the Franklin Water District, the Safford cotton growers, all the way to the pool? Is that a reality, or are we really probably looking at some point at a pipeline?

Mr. SPARKS. That is a reasonable question, and it would be reasonable for you to ask it even if it was unreasonable.

[Laughter.]

Mr. SPARKS. But the answer is, under the proposed settlement, it is not realistic to expect that the river will flow except at flood flows. And the proposal has been made in the past that a canal be developed, or pipeline, all the way from the head of Safford Valley at San Jose Diversion all the way to the San Carlos Apache points of use. That certainly would supply high-quality water at that location. It does nothing to address the inadequacy of San Carlos Apaches' water.

The one thing that has never been given serious thought, which in my mind is the only safety valve that may be possible to relieve some of this problem, is actually a pipeline from the CAP canal to San Carlos Lake, which would allow CAP water to be parked in San Carlos Lake, much like it is in Lake Pleasant as increased. It is very expensive, but it is the one place where water can be parked at a time when demands on the CAP canal is lower and the water could then be used not only to buffer and mitigate upstream diversions at various times, but it also could be used to move water downstream to Ashurst, Hayden, and on down to Tucson when the CAP canal is at capacity.

Mr. RENZI. Thank you, Joe.

Governor Narcia, there has been some discussion, particularly in Chairwoman Kitcheyan's comments, about the Globe Equity Decree and their rights. Could you discuss or have counsel discuss briefly how the settlement or how the opinion of the tribe is that it may override the settlement, override their rights?

Mr. NARCIA. If I understand your question regarding overriding their claims—

Mr. RENZI. I am just looking for—yes, the claim of the San Carlos Apache is that this settlement is going to override their Globe Equity Decree rights and I am just looking for your response.

Mr. NARCIA. Congressman Renzi, no, it does not. We have simply agreed not to enforce our rights upstream for the upstream diverters. The San Carlos Apache Tribe and the United States on their behalf remain completely free to pursue enforcement of their rights. We have in the past been in court with the San Carlos Apache Tribe doing just that. Our settlement means that only we will no longer pursue the enforcement together. The San Carlos Apache Tribe can certainly continue on their own.

Also, the 1992 San Carlos Apache Tribe settlement did not interfere with our ability to assert our rights under the 1935 Globe Equity Decree. In the same fashion, our settlement does not interfere with the San Carlos Apaches' ability to assert their rights.

Mr. RENZI. I thank the gentleman.

I am going to move now to the Congressman from Arizona, Mr. Hayworth.

Mr. HAYWORTH. Mr. Chairman, I thank you very much, and again, thanks to all the witnesses for coming and taking part in

this worthwhile hearing. I think we still hear, as has been chronicled this morning, that a great deal of work is done and there is some work that remains.

Governor NARCIA, could you describe some of the steps you have taken to work with the other tribes in your settlement negotiations with the United States and the other settlement parties?

Mr. NARCIA. Early in our negotiations, we met and discussed with other Arizona Indian tribes our water settlement for the Gila River. We desire to approach the settlement with non-Indian parties with a common effort with other tribes.

During the negotiation process, we met with representatives of the San Carlos Apache Tribe, the Tohono O'odham Nation. I personally participated in numerous meetings with the San Carlos Apache Tribe. In addition, our negotiation team participated in dozens of meetings with them, also.

During the negotiations, we also met with representatives of the Tohono O'odham Nation. The community shared with the representatives of the Nation our settlement agreement and proposed legislation. In turn, the Tohono O'odham Nation shared with us drafts of their proposed legislation and settlement agreement.

In addition, we met several times to discuss common concerns. Recently, we have met with the majority of the tribal leaders, including Walapi Nation, the Camp Verde Yavapai Tribe, Hopi Tribe, San Carlos Tribe, and Cuchan to discuss issues surrounding water settlement. We will continue to meet and I remain personally available for any future meetings as appropriate.

Mr. HAYWORTH. Thank you very much, Governor.

Let me turn to Director Guenther of the Arizona Department of Water Resources. Mr. Guenther, do you believe this bill will allow for adequate water and financial resources to help resolve other water rights settlements?

Mr. GUENTHER. Mr. Hayworth, no. I mean, I can elaborate on that, if you would like.

Mr. HAYWORTH. Please.

Mr. GUENTHER. Obviously, the difference between the claims and what is available is significant. There are more claims to water in Arizona than there is water on any river system that we have, and the Gila is no different. The Gila is different inasmuch as it is a much, what do I say, it is either feast or famine on the Gila, and so you don't have significant dependable base flows that are available for the settlement of perfected long-term or Federal reserve rights.

Now, a lot of that water has already been divided up by decree and so we are left with waters that are imported from the Colorado River, which then through exchange can be made available for rights that would have been on the Gila River. That water is limited, too. The Central Arizona Project really is only entitled to about 1.4 million acre feet off the Colorado River. All the other rights are higher priority and perfected by users along the Colorado River.

So if you take that 1.4 million and then you assess the claims that are against it, you tend to run out of water very quickly. And so in this—I think the settlement is fair in the division of the waters between the non-Indian and Indian communities, but is

there enough water to settle all the claims? No. Is there water there to settle a lot of the realistic uses, the beneficial uses that this water could be put to on Indian lands as well as non-Indian? I believe it would go a long way toward that end.

Mr. HAYWORTH. Director Guenther, I thank you for that candid answer and I think it reaffirms the importance of this hearing and what transpires with this vital resource that is so important to us all, water, within the State of Arizona. And again, I want to thank everyone for coming today.

You mentioned some of the previous decrees, some of the challenges that brought us here. But for the record, obviously, there are other Indian tribes with claims on other river systems in the State of Arizona, for example, the Salt River. With your knowledge of the Salt River system, granted that we have typified here, specified that there is never enough to anyone's liking in an ideal situation, because, after all, so much of our State is desert, with reference to the Salt River system, how much water is there that could be used to satisfy claims?

Mr. GUENTHER. Well, really, there is no water available. I mean, the Salt River is overallocated, as well. So if you want to say, is there any water available to settle outstanding claims of a higher priority right, the answer would be no. But that is—the way the system works, as far as appropriated water is concerned and doctrine of appropriation, right in time, first in right. So if you are going to negotiate a settlement of claims that have a more senior right, then you take water from a current user and make that water available to satisfy that senior right, which has been done on all of the river systems and is involved—that is basically what we are doing here with this bill.

Mr. HAYWORTH. Director Guenther, thank you.

Just in closing, and I thank you all for the time, and I thank you, Mr. Chairman, for being very respectful of the time, for those who have come here to testify on H.R. 885, just a quick answer. Obviously, there are some outstanding issues that need to be resolved. I would like to ask all parties who are here in testimony, will you commit to sit down and resolve these issues promptly?

[Nodding from witnesses.]

Mr. HAYWORTH. We are seeing nods of ascent.

Ms. KITCHEYAN. San Carlos Apache agrees to compromise, to negotiate in good faith. We also expect the same from everyone.

Mr. HAYWORTH. Thank you, Madam Chair.
Governor NARCIA?

Mr. NARCIA. We have always been open to negotiating with anyone to resolve any issues that we may have. As I said earlier, this is our highest priority and whatever we need to do to reach settlement and resolve issues, we are certainly open to meet with anyone.

Mr. HAYWORTH. Thank you very much.
Chairman?

Ms. JUAN-SAUNDERS. It has taken us 28 years to reach this level and it is important to bring parties to the table and to discuss issues and to be respectful of one another. Water is a precious commodity for everyone and we certainly have done that in good faith with all parties in Southern Arizona.

Mr. HAYWORTH. Thank you very much.

Mr. Guenther?

Mr. GUENTHER. Mr. Hayworth, the Governor's top priority—Governor Napolitano's top priority—is settling outstanding claims to water rights, especially with the American Indian communities. I stand ready to commit to that, as well, and have already begun negotiations with several tribes who have not been to the table in quite some time. To the degree that we can start with realistic water budgets and numbers, it certainly would enhance the chances of bringing those negotiations to some beneficial closure.

Mr. HAYWORTH. Thank you.

Mr. Lopez?

Mr. LOPEZ. Representative, New Mexico has been working on identifying the issues that are important to us to assure that New Mexico's interests are protected and we stand ready to continue those negotiations in good faith.

Mr. HAYWORTH. Thank you very much. Ladies and gentlemen, again, thank you for the testimony. Mr. Chairman, I guess it just shows again that whiskey is for drinking, water is for fighting, or perhaps for meaningful mediation, and we are grateful for the negotiations and thank you all.

Mr. RENZI. Thank you, Mr. Hayworth.

We are going to go one more round here. The gentlelady from California.

Mrs. NAPOLITANO. I can go another five rounds, really. I have so many questions that I am sure time will not permit, but one of the things that really bothers me from what I have heard is, whether it was Kathy Kitcheyan or Mr. Sparks stating they would have to pay \$74 an acre foot where upstream is about a third of the cost. Could somebody answer the reason why?

Ms. KITCHÉYAN. Madam, I will defer that question to our Legal Counsel.

Mrs. NAPOLITANO. If you will make it short, because I have several other questions, please.

Mr. SPARKS. Mr. Chairman, Congresswoman, the \$26 to \$28 price is the non-Indian CAP price in the valley, not upstream, at San Carlos.

Mrs. NAPOLITANO. Upstream, OK.

Mr. SPARKS. The decreed water costs about \$3.41 an acre foot, and that is what the local price would be and that is—it is even a greater disparity. The CAP water costs \$74 and \$28 is the spread between what it costs the Indian tribe to use agricultural water of its own and what it costs the non-Indian farmer to use the same Indian agricultural water that is unable to be paid for and delivered to the Indian tribes.

Mrs. NAPOLITANO. And why is that?

Mr. SPARKS. Because they can't afford it or they don't have a delivery system for the exchange systems.

Mrs. NAPOLITANO. And those delivery systems have been requested be put in place? Have they been negotiated? Have they been somewhere on somebody's table to be able to address—

Mr. SPARKS. Pardon me. They were authorized by the 1968 CAP Act. They were authorized by the 1980 CAP contracts for each of the tribes and they really never—the non-Indian systems were

built. The Gila River Indian Community system is being built. The Achan system was built, but the tribes which require delivery by exchange have not been built and they will be last to be built if there is money left over under the Basin Project Act fund.

Mrs. NAPOLITANO. Mr. Chairman, it looks like the priorities have to be reorganized.

One of the other questions I would have for Mr. Guenther from Arizona, under the current law, what happens to CAP Indian water if it is not used by the tribe and how would that change under this bill, and if there is excess water, which many times there won't be, I am sure, any excess water, are the tribes compensated for that water that is not used by them and used by other entities?

Mr. GUENTHER. Congressman——

Mrs. NAPOLITANO. Woman.

Mr. GUENTHER [continuing]. Napolitano, my sense is right now, as I recall, that water is excess water——

Mrs. NAPOLITANO. Right.

Mr. GUENTHER [continuing]. And is available for distribution under excess water rules by the CAWCD. As far as what is paid for, usually it is you pay for the water whether you use it or don't use it. It depends if you have an allocation for CAP water. It is the same for Indian and non-Indian.

Mrs. NAPOLITANO. Thank you. I hear a lot of discussion about the water, the differences, the allocations, but I hear no one talking about establishing either recycled water projects or finding out if you have underground water aquifers where you can store water or being able to do what we are doing in California, and that is recycling brine water, in other words, cleaning it for use, another use, and I would like to have somebody tell me if there is anything in anybody's mind toward this area, toward this end.

Mr. NARCIA. Congressman Napolitano, our bill does, or our settlement does include reclaimed water was part of our water budget and the reuse of reclaimed water.

Mr. RENZI. Sir, go ahead. Did you finish?

Mrs. NAPOLITANO. Well, that doesn't totally answer my question. I think what I am searching for is that American Indian tribes have forever and ever said that water is sacred. We are learning that in the inner cities and beginning to take care of it, or beginning to look at ways of being able to reuse it. There is no more water. We have water. We just in some areas do not use it wisely. We contaminate it, and that is borne out in the defense installations where we now have volatile organic compounds and perchlorates and all those great things brought about by industry.

I guess my concern is whether or not your being helped to be able to harness rainwater, to be able to store it, to be able to understand how other options are available, if they are available, and how you can go about instituting those, coming through for appropriations through this body to assist——

Mr. HAYWORTH. Would my friend yield for just a second to——

Mrs. NAPOLITANO. I certainly do.

Mr. HAYWORTH. I think it is important just to reaffirm something that we have had to live under in Arizona for now over 20 years, the Groundwater Management Act, which I think for all water users, both Native American and non-Native American, that has

been something that we have done and we are pleased to see others are doing it and I am pleased that you raised that, but I believe that is something under which we all live within the State of Arizona and have done so for the better part of two decades.

Mrs. NAPOLITANO. Thank you. Well, I am talking about utilization of rainwater, capturing, storing, et cetera, and that is where I am coming to, is those other issues that—I know underground water management has been totally all over in Arizona and New Mexico.

Ms. JUAN-SAUNDERS. Mr. Chairman, Congressman Napolitano, the Tohono O'odham Nation is located in Southern Arizona. We live in the desert. We survive temperatures of 110 degrees every summer, and over the last eight to 10 years, we have experienced severe drought and just 2 years ago requested a state of emergency for the whole State of Arizona in Southern Arizona. So rainwater is precious to us, but we are not getting—we can't control Mother Nature.

Mrs. NAPOLITANO. Correct.

Ms. JUAN-SAUNDERS. So any alternative sources of water is so important to the Nation.

Mrs. NAPOLITANO. Have you been able to identify any underground storage capability or capacity?

Ms. JUAN-SAUNDERS. Not at this point.

Mrs. NAPOLITANO. Thank you very much.

Mr. RENZI. I thank the gentlelady. I want to——

Mr. NARCIA. Mr. Chairman?

Mr. RENZI. Please, go ahead, sir.

Mr. NARCIA. You know, water conservation has been uppermost in the minds of Gila River. You know, your suggestion with the rainwater, the annual rainfall in Arizona, or Southern Arizona, is about seven or 8 percent a year, or annually, so there isn't much rainwater to come. But living on, as Chairman Saunders stated, we are in a desert and water conservation is the highest priority for us and the use of that water.

Mr. GUENTHER. Mr. Chairman, if I could just add a little bit to that, to answer——

Mrs. NAPOLITANO. I just want to say, I don't diminish what is being done. I am just wondering if all other options, all other assistance from the government, from the Department of Interior, from Bureau of Reclamation, from the Army Corps of Engineers have been utilized for the tribes. I am not talking about the major communities, which I am sure can take care of themselves. I am talking about assisting tribes.

Mr. GUENTHER. Yes, and we do that. Most of our major projects, the San Carlos Project, which Coolidge Dam, that is an Indian project. We have the Salt River system, which captures just about every drop of rain or snow that comes off the watersheds. And then, of course, we have the Verde River systems, which is on the other side of the State, which captures all the water that comes off those watersheds. And then at the bottom of it, we have one dam that never has water in it which is used to take the crest off floods.

But we also have water banking programs, which we bank water. In fact, we bank water for California and Nevada in underground banks that by exchange is made available at times of increased

need, and we also have replenishment districts, which take all the excess water and put that in the ground so it will evaporate for future use.

Mr. RENZI. I thank the gentlelady.

I have just got a couple of questions. Mr. Pollack, when we talk about the Navajo Nation and we talk about the settlement and the ability that it might interfere with water flowing in from New Mexico into Arizona, could you expand on that and could you provide me, particularly with Congressman Hayworth here today, what you see as the simple fix?

Mr. POLLACK. Thank you, Congressman Renzi. The solution for Window Rock's water shortage is to get water from New Mexico, and we believe that the project that we have negotiated with the State of New Mexico is the project to do that. That is the Navajo-Gallup Project. Because the water is used in the State of Arizona, the Colorado River Basin States abide by the terms of the Colorado River Compacts, which require that uses charge—I am sorry, uses that are made within any given State be charged against that State. So even though we would be taking water from the San Juan River in New Mexico, in order to charge it to the place of use, we would need to get an Arizona water right to do that. So what we are seeking is an Arizona water right.

We think that the easiest solution is simply for the Secretary of the Interior to allocate 6,400 acre feet of water under her control. We can't get that allocation under the provisions of 104(b) without an Arizona settlement. Ironically, we would have a settlement with New Mexico, but not one with Arizona and, as I said before, there are a myriad of issues that we have with the State of Arizona. We are ready to move on a New Mexico settlement and the Window Rock water supply simply can't wait to resolve all the issues we have with Arizona.

We believe that an appropriate fix would be for this legislation to carve out 6,400 acre feet of water, not for the Navajo Nation but 6,400 acre feet of water that could be held by the Secretary of the Interior in the event that there is a Congressionally approved water rights settlement with the State of New Mexico to provide that 6,400 acre feet. So we would have parallel provisions.

Mr. RENZI. Thank you. Is there anyone who would like to comment on that?

Mr. GUENTHER. Mr. Chairman, I can comment on it. We—obviously, we are talking about two different basins here, but I do see the Navajo's concern with regard to the limitations that 104(b) may or may not legally impose. But regardless of which way we do go, I would ask that we participate very closely in any words that are chosen with regard to this type activity because it involves 1922 Compact issues, which are extremely sensitive in the Basin States. It is a matter of Upper Basin right versus Lower Basin right, Upper Basin diversion use and Lower Basin. I mean, they are artificial boundaries, but—

Mr. RENZI. You don't necessarily agree that the settlement would impede the ability? You are not sure about that? You need to research that more?

Mr. GUENTHER. Yes, and it would not impede the ability of using a leased right or a purchased right, of a retired agricultural right

of some other type on the river. But I think Mr. Pollack is probably correct that it could be interpreted to include an allocation.

Mr. RENZI. OK. We can work on that, too, then.

Let me finish up by asking Chairwoman Kitcheyan, we spoke a little bit about the Globe Equity Decree and the fact that you feel that the settlement would impinge on those rights. Governor Narcia addressed it by saying that he is willing to give up his upstream rights. Chairwoman Kathy, do you want to comment on that?

Ms. KITCHEYAN. You know, I was listening to Governor Narcia talked about the upstream rights. Though we have not met to discuss this, I have been in office 9 months now and we did have one meeting scheduled, and unfortunately, I was ill, so we didn't meet to discuss it.

However, on the Globe Equity, you know, that has been since 1935 and we have never received our full allocation of it. I would certainly like to see Governor Narcia give up his right plus more. Thank you.

[Laughter.]

Mr. RENZI. I think—yes, go ahead, Joe.

Mr. SPARKS. Mr. Chairman, in further response and supplement to the Chairwoman's response, the Gila River Indian Community is not giving up their Globe Equity rights. They still will have the right to take, when the river is running on priority, the first 437.5 cubic feet per second of the natural flow of the river. What they have potentially agreed to is that the Upper Valley pumpers can take that water in disregard of Gila River's priority to have the first 437.5 cubic feet per second. But Gila River has not given up its right to call on that water and the result of that is that the pumpers will continue pumping in violation of the decree at least as to the way San Carlos is treated—

Mr. RENZI. And the threat that you—

Mr. SPARKS [continuing]. And the flow of the water will be reduced by that pumping.

Mr. RENZI. OK. Let us wrap up. Is there anything substantive that remains in any of your hearts that hasn't been drawn out? Real quick. We are going to go to votes here in about 5 minutes. Speak now, please. Is there anyone else who would like to address any issue of a substantive nature?

[No response.]

Mr. RENZI. OK. With that, I want to thank the witnesses for their valuable testimony. I want to thank the members here for their questions. Members of the Subcommittee may have additional questions for the witnesses and we will ask that you respond to these in writing. The hearing record will be open for 10 days for these responses.

If there is no further business before the Subcommittee, I thank the members of the Subcommittee and our witnesses. The Subcommittee stands adjourned.

[Whereupon, at 12:33 p.m., the Subcommittee was adjourned.]

The following information was submitted for the record:

- Arizona Cities of Chandler, Glendale, Goodyear, Mesa, Peoria, and Scottsdale, Statement submitted for the record in support of H.R. 885
- Fines, L. Anthony, Attorney for Gila Valley Irrigation District and David A. Brown, Attorney for Franklin Irrigation District, Statement submitted for the record
- Gila River Indian Community, Supplemental testimony submitted for the record
- Hawker, Hon. Keno, Mayor, City of Mesa, Arizona, Statement submitted for the record
- Mason, Douglas, General Manager, San Carlos Irrigation and Drainage District, Coolidge, Arizona, Statement submitted for the record in support of H.R. 885
- Payson, Town of, Arizona, Statement submitted for the record by the Mayor and Common Council in support of H.R. 885
- Renner, George, President, Board of Directors, Central Arizona Water Conservation District, Statement submitted for the record
- Rimsza, Hon. Skip, Mayor, City of Phoenix, Arizona, Statement submitted for the record in support of H.R. 885
- Sullivan, John F., Associate General Manager, Water Group, Salt River Valley Water Users Association and Salt River Project Agricultural Improvement and Power District, Statement submitted for the record in support of H.R. 885
- Talley, Hon. Van, Mayor, City of Safford, Arizona, Statement submitted for the record in support of H.R. 885

Statement submitted for the record by the Arizona Cities of Chandler, Glendale, Goodyear, Mesa, Peoria, and Scottsdale

Chairman Calvert and Members of the Subcommittee:

The Arizona Cities of Chandler, Glendale, Goodyear, Mesa, Peoria and Scottsdale ("Cities") appreciate the opportunity to submit this testimony in support of H.R. 885. The Cities collectively represent more than 1.6 million people within the Phoenix metropolitan area of Maricopa County, Arizona. H.R. 885 is very important to the Cities and other water users throughout Arizona.

H.R. 885 approves the settlement of ongoing disputes over the past decade between the United States and Arizona interests concerning Central Arizona Project ("CAP") repayment and water allocation issues. H.R. 885 also approves the settlement of long-standing disputes relating to the Gila River Indian Community water right claims. The Gila River Indian reservation includes a large land area of approximately 372,000 acres immediately south of the Phoenix metropolitan area where the Cities are located.

H.R. 885 resolves these contested CAP repayment, CAP water allocation and Gila River Indian Community water rights claims in a manner that is fair and equitable to all parties. H.R. 885 is important to the Cities and their future water management. It provides more certainty regarding the Cities' future water supplies while settling complex and contentious CAP and Indian water rights claims.

The Cities are contributing substantial financial and water resources to the Gila River Indian Community as part of the Gila River Indian Community Settlement. The City of Chandler is directly contributing 4,500 acre feet of reclaimed water annually to the Gila River Indian Community as part of the Settlement. In addition, both Chandler and Mesa are annually contributing up to 8,100 acre-feet of additional high quality reclaimed water to the Gila River Indian Community as part of the Settlement. The Cities have contributed millions of dollars in treatment and delivery infrastructure to provide this water to the Gila River Indian Community at no cost to the Community or the United States. The other Cities are contributing tens of millions of dollars to the Settlement by leasing CAP water from the Community.

The Cities' consideration for the above contributions also includes the benefits the Cities are receiving under Title 1 of H.R. 885. The settlement of the CAP issues re-

flected in Title 1 of H.R. 885 is directly connected to the settlement of the Gila River Indian Community water rights claims.

Title 1 approves the reallocation of CAP water previously designated for allocation to Arizona municipal and industrial interests. Since the mid-1980's, 65,647 acre-feet of CAP water that was designated by the Secretary of Interior for allocation to Arizona's municipal and industrial sector has remained uncontracted. This represents enough water to serve a population of nearly 300,000 people. Despite the undeniable need for the water by Arizona's Cities and Towns, this water has remained unallocated because of various disputes between the United States and the Central Arizona Water Conservation District over the CAP repayment obligation and allocation of CAP water between Federal and non-Federal interests. H.R. 885 resolves those disputes and provides a final allocation of CAP water between federal and state interests in Arizona. Under Title 1 of H.R. 885, the Cities each receive a specific allocation of the uncontracted municipal and industrial CAP water, which is needed to serve their growing populations.

In addition, the Cities' municipal and industrial CAP subcontracts, like the Gila River Indian Community's CAP contract, will be expressly recognized as permanent service contracts with the existing delivery terms extended for 100 years. Title 1 of H.R. 885 also provides for the future allocation of 96,295 acre-feet of agricultural priority water to Arizona's municipal and industrial interests.

The settlement of the Gila River Indian water rights claims as approved by H.R. 885 accomplishes many objectives. First, the Settlement Agreement permanently settles all water rights claims of the Gila River Indian Community to both surface water and groundwater, including all appropriate rights, federal reserved rights and aboriginal rights. Second, it resolves disputes as to groundwater pumping, land subsidence and water quality. Third, it will provide the Gila River Indian Community with a significant water right to develop the Community's lands. Fourth, it will furnish the Gila River Indian Community with adequate financial resources to allow for the beneficial and productive use of the water resources provided by the Settlement. This Settlement also will allow the parties, Native American and non-Native American, to plan for the future use and development of their water resources in cooperation rather than in conflict, and with certainty rather than uncertainty.

H.R. 885 also provides an additional 214,500 acre-feet of CAP water to be allocated to Federal interests in the State. This represents a significant transfer of water from non-Federal to Federal interests within Arizona. However, the Cities recognize that the transfer of this water will help resolve Indian water rights claims, including the claims of the Gila River Indian Community and other Native American interests whose water rights claims have not yet been settled.

H.R. 885 also resolves significant claims against the federal government, some of which involve only the federal government and the Gila River Indian Community. H.R. 885 provides an important opportunity for the federal government to meet its trust obligations to the Native American communities involved while at the same time providing long-term certainty regarding available Central Arizona Project Water ("CAP") supplies to both Native American and non-Native American interests in Arizona.

All parties to the CAP and Gila River Indian Community settlements benefit by settling their claims rather than continuing with protracted litigation. This settlement, as approved by H.R. 885, provides extensive and creative mechanisms to accomplish all the parties' objectives. These mechanisms are unavailable through a court process. These creative mechanisms include exchanging reclaimed water for some of the Gila River Indian Community's Central Arizona Project Water and the Cities leasing CAP water from the Community. The settlement also includes the use of some state parties' water facilities to deliver water designated for the Community under the Settlement. This settlement provides for the parties to work together to accomplish their respective water use objectives and needs rather than continuing to devote substantial sums litigating over the nature and extent of CAP water allocation rights and the Gila River Indian Community's water rights.

The settlement of the CAP repayment and water allocation issues allows the parties to plan adequately for the future by eliminating uncertainty regarding available CAP water supplies and the Gila River Indian Community's water rights claims. The problems that H.R. 885 resolves are serious problems, both for Arizona and the federal government. H.R. 885 represents a fair settlement of the disputes over the CAP repayment and water allocation issues, and the Gila River Indian Community's water rights claims. We therefore urge your support of H.R. 885 and appreciate the opportunity to provide our written testimony to you.

NOTE: This statement was signed by the following individuals:

Boyd Dunn, Mayor, Chandler, Arizona
 Elaine M. Scruggs, Mayor, Glendale, Arizona
 Jim Cavanaugh, Mayor, Goodyear, Arizona
 Keno Hawker, Mayor, Mesa, Arizona
 John Keegan, Mayor, Peoria, Arizona
 Mary Manross, Mayor, Scottsdale, Arizona

Statement submitted for the record by L. Anthony Fines, Attorney for Gila Valley Irrigation District, and David A. Brown, Attorney for Franklin Irrigation District

Chairman Calvert and Members of the Subcommittee, we have read some, but not all, of the testimony presented on behalf of the San Carlos Apache Tribe with respect to H.R. 885, the Arizona Water Settlements Act. In our opinion, much of the testimony presented on behalf of the San Carlos Apache Tribe is incorrect or not true. We do not have the time to address all the errors, but one error is especially significant. In the settlement that we are negotiating on behalf of the Gila Valley Irrigation District and the Franklin Irrigation District with the Gila River Indian Community, all parties have been careful to draft the language so that the rights of the San Carlos Apache Tribe will be unaffected by the settlement. In fact, the San Carlos Apache Tribe will have the same opportunities and ability to assert its rights after the settlement that it now has. We are hopeful that we will also be able to negotiate a settlement on behalf of our clients with the San Carlos Apache Tribe. If we are unable to reach a settlement with the San Carlos Apache Tribe, we will agree to any appropriate amendments to make clear that the rights of the San Carlos Apache Tribe are unaffected by our clients' settlement with the Gila River Indian Community.

Thank you for the opportunity to present this rebuttal statement.

L. ANTHONY FINES
 DAVID A. BROWN

Statement submitted for the record by the Gila River Indian Community

This supplemental testimony is being submitted to correct certain errors, omissions, and misstatements contained in the testimony of the San Carlos Apache Tribe (SCAT). Because of the large number of such errors, omissions and misstatements the Gila River Indian Community (Community) has limited its supplemental testimony to those that were most egregious or potentially misleading. The italicized text below indicates the error, omission or misstatement being addressed and the Fact section presents the Community's correction for the record.

I. SAN CARLOS APACHE RESERVATION

A. *Water sources*

During the hearing before the House Water and Power Subcommittee of the House Resources Committee, the Chairperson of the San Carlos Apache Tribe asserted that the flow of the Gila River was contaminated by pollution that causes birth defects on the SCAT Reservation.

Fact: First, as discussed in greater detail below, the only known water quality issue present in the upper Gila River concerns salinity from within the Gila River basin. It is generally accepted that elevated salinity levels in water, particularly of the levels found in the upper Gila River basin, do not, by themselves, cause birth defects. The Community recently contacted local and state health officials to confirm that there is no known connection between salinity in water and birth defects.

Second, even if there were a connection between increased salinity and birth defects, which there is not, SCAT's written testimony to the Committee confirms that SCAT does not use Gila River water for any domestic or municipal use but rather relies exclusively on groundwater for domestic and municipal uses.

Third, although the rate for all Arizona Indians is high by comparison to non-Indians, the rate of birth defects at SCAT (2.4%) is not elevated at all by comparison to the average rate of all other tribes in Arizona (2.5%).

During the hearing, an attorney for SCAT indicated that federal court rulings explicitly require the delivery of SCAT's 6,000 acre-feet of water per year (af/y) by direct diversion from the Gila River, rather than by means of an upstream diversion into a pipeline that avoids high salinity springs that flow into the Gila River.

Fact: SCAT's written testimony includes the Water Quality Injunction issued by the Globe Equity Court on May 28, 1996, which states:

"Nothing in this injunction shall prohibit the parties, upon agreement or by order of this Court, from connecting the Apache Tribe's irrigation system directly to the canals of the Gila Valley Irrigation District for Delivery of water directly to Apache farm lands. *The connections may be made by canal or a pipe.*" (SCAT Exhibit K, p. 14 (emphasis supplied).)

II. OVERVIEW OF TITLE I AND TITLE II OF THE ARIZONA WATER SETTLEMENT (SIC.) ACT (S. 437 AND H.R. 885)

The settlement agreements and the exhibits to the settlement agreement "attempt to 'legislate' the water rights of [certain] parties in lieu of their adjudication in the Gila River Adjudication." (p. 3)

Fact: First, a condition of the enforceability of the Arizona Water Settlements Act is the approval by the Gila River Adjudication Court of the Gila River Indian Community Water Rights Settlement Agreement (Settlement Agreement). Thus, any water rights confirmed to the Community as a result of this settlement will be reviewed, and hopefully approved, by the Gila River Adjudication Court. During this court approval process any affected party, including SCAT or the United States on its behalf, may object to the settlement stating the grounds for their objection. The Gila River Adjudication Court will then render a judicial determination itself approving the Settlement Agreement or not.

Second, all of the Indian tribes with claims to the waters of the Gila River and its tributaries are participating in the Gila River Adjudication. Several of these Indian tribes, including SCAT, have reached agreements with other parties asserting adverse or competing claims. These agreements provide that in exchange for an agreement on the amount of reserved right to be asserted by or on behalf of the Indian tribe, the tribe and the United States in its trust capacity for that tribe, agree not to challenge the claims of the parties to the agreement. In addition to entering such an agreement, SCAT sought and obtained a Special Proceeding before the Gila River Adjudication Court to obtain expeditious consideration of its agreement. The Court's order was issued December 12, 1999. There is absolutely no basis for SCAT to challenge the Community's effort to utilize the same process to reach settlements in the Adjudication. The Community's settlement no more "legislates" water rights in the Adjudication than the SCAT Settlement, the Fort McDowell Settlement, the Salt River Pima-Maricopa Settlement, or the Yavapia-Prescott Settlement.

"The proposed legislation also attempts to settle all pending disputes between certain decreed parties in the Globe Equity No. 59 proceeding. (p. 3)"

Fact: First, the legislation and the Settlement Agreement only address the Community's pending disputes with certain parties in the Globe Equity 59 enforcement proceeding. All other parties, including SCAT, retain all their legal rights in connection with any pending or future proceedings to protect their rights or claims to water in Arizona.

Second, an additional condition to the enforceability of the Arizona Water Settlements Act is the approval of the Community's Settlement Agreement by the Globe Equity Court. Thus, any water claims settled by the Community as a result of this settlement will be reviewed, and hopefully approved, by the Globe Equity Court. During this court approval process any affected party, including SCAT or the United States on its behalf, may object to the settlement stating the grounds for their objection. The Globe Equity Court will then render a judicial determination itself approving the agreement or not.

"The settlement agreements would allow Gila Valley and Franklin Irrigation Districts to continue to pump up to six acre-feet per year of water from the 'subflow' of the Gila River in violation of the Tribe's senior 1846 water rights under the Globe Equity Decree and continue to divert water for 'hot lands' which do not have any decreed water rights." (p. 3)

Fact: The Community has agreed not to challenge uses of up to 6 af/y of water (by pumping and direct river diversions) on a number of acres that is reduced from current levels by 3,000 acres. The Community's agreement not to challenge such uses is contingent on the Upper Valley Diverters' ("UVDs") compliance with very specific conditions set forth in the UVD Agreement, including monitoring requirements and control of phreatophytes, among many others. The existing "hot lands" are part of the acreage limit to the extent they become Decreed lands pursuant to application to Globe Equity court for such status. SCAT may object to such application, as may the United States on SCAT's behalf, or any other party except the Community.

Overall, the UVD agreement will unquestionably reduce UVD water use and consumption. Diversion and pumping records for the period 1936–1997 clearly show that pumping and surface diversions as well as total consumptive use of water by crops will be reduced when the Settlement Agreement is fully implemented. The Settlement Agreement holds the UVDs to total pumping and diversions of approximately 181,860 af/y. In every year since 1956, the UVD's combined pumping and diversions have substantially exceeded this amount. The average of the UVDs' combined pumping and direct diversions for the period 1937 to 1997 was almost 230,000 af/y.

Most significantly, all uses of water, even uses that conform to the UVD agreement, will still remain subject to challenges by SCAT if they believe such uses affect their 1846 water right. There is nothing in the legislation, the Settlement Agreement or its exhibits which prevents SCAT or the United States, in any capacity other than as trustee for the Community, from proceeding with any new or existing claims against the UVDs.

III. CENTRAL ARIZONA PROJECT

B. Repayment of CAP debt to United States

"If CAWCD's debt was \$1.65 billion, that would leave approximately \$2.35 billion in project costs unresolved and possibly charged to Indian lands." (p. 6–7)

Fact: There is simply no basis in federal law or policy for even speculating about whether CAP costs will be disproportionately charged to Indian tribes because the Colorado River Basin Project Development Act of 1968 (CRBPA) imposes the following limitation:

"The Secretary shall determine the repayment capability of Indian lands within, under, or served by any unit of the Central Arizona Project. Construction costs allocated to irrigation of Indian lands and within the repayment capability of such lands [shall be indefinitely deferred as provided in 25 U.S.C. § 386a], and such costs that are beyond repayment capability of such lands *shall be nonreimbursable*." (43 U.S.C. § 1542, emphasis supplied)

Other parties address the SCAT's other misstatements about CAP repayment.

C. CAWCD sells Indian water to non-Indians and keeps the income

D. CAWCD discriminates against Indians in its pricing structure for CAP water which makes tribal use of CAP water under Indian contracts cost prohibitive

E. Disincentive to construct tribal CAP projects due to CAWCDs ability to market Indian water for non-Indians and keep the income

Fact: The Community agrees that CAWCD has very recently proposed a problematic "excess water" pricing scheme, which, if implemented, would allow non-Indians to purchase CAP water at a lower rate than Indian tribes. Such policy would affect the Community more than SCAT because the Community has an existing CAP allocation of water that is larger than that of SCAT. The enactment of Title I of S. 437 and H.R. 885 will provide immediate relief from the disparity caused by this proposed CAWCD pricing scheme. In addition, because CAWCD will be reimbursed by the federal government for fixed Operation, Maintenance, and Replacement (OM&R) charges for CAP water held under long-term tribal contracts, and not reimbursed for such charges for "excess water", the CAWCD's incentive will be to encourage the use of CAP water by Indians.

H. CRBP development fund will be used for non-project purposes and will continue to be used to the disadvantage of Indians

Fact: Each of the points raised in this section are effectively refuted by the proposed amendment to § 403 (43 U.S.C. § 1543) of the Colorado River Basin Project Act (CRBPA).

Three sources of revenue established by the CRBPA and the "annual payment by the CAWCD to effect repayment of reimbursable CAWCD construction costs [\$1.65 billion], shall be credited against the annual payment owed by the CAWCD," and then all of these funds:

"shall be available annually, without further appropriation, in order of priority: (A) to pay fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water under long-term contracts for use by Arizona Indian tribes." (§ 107(a))

"GRIC is first in line to take the credits from the annual payments made by CAWCD each year. GRIC proposes to not only use the Fund for CAP purposes * * * it will use \$147 million to rehabilitate its BIA San Carlos Irrigation Project system which delivers water to GRIC from the Gila River." (p. 12)

Fact: The Settlement Agreement ratified by S. 437 and H.R. 885 impose an annual cap of \$25 million on the amount of money available from the Lower Colorado River Basin Development Fund (Development Fund) for San Carlos Irrigation Project (SCIP) rehabilitation. This ensures that every year there will be millions of dollars in excess of this particular cap that can and will be applied to other Indian projects. At the request of other parties, the Community agreed to this annual limit to ensure that other Indian water projects are also paid for on an ongoing basis. The Bureau of Reclamation has developed a projection of funding inflows and outflows for the Development Fund that demonstrates that all Indian projects currently contemplated, including SCAT, will be funded in a timely and certain manner.

SCAT appears to argue that none of the Development Fund should be available for tribal irrigation systems unless those systems are used exclusively for CAP water. Yet the SCAT project authorized by its 1992 settlement, and funded by the Development Fund, will deliver both CAP water and non-CAP water. "The draft EIS will evaluate reasonable alternative methods of delivering the CAP water and other waters" including 6,000 af/y of G.E. 59 decreed water, 7,300 af/y from the Black and/or Salt Rivers, and water from local Tribal water sources. (Notice of Intent to Prepare EIS, 67 Federal Register 8316 (February, 2002))

In addition, SCAT's argument would deny access to the Development Fund to the Navajo Nation, Hopi and possibly other Indian tribes in the Gila River watershed and other Arizona watersheds if they obtain settlements that include non-CAP water supplies.

I. The proposed legislation will require that tribes have a water rights settlement in place before a tribe can use CAP water whereas non-Indians have been able to use CAP water for years without a settlement of water rights

"Tribes without water settlements will not have their CAP delivery systems built until a settlement is in place. That violates the Tribe's CAP contracts." (p. 13)

Fact: This statement simply ignores the provisions of S. 437 and H.R. 885, which provide that both CAP repayment funds and appropriated funds are available "to pay the costs associated with the construction of distribution systems required to implement the provisions of * * * (II) section 3707(a)(1) of the *San Carlos Apache Tribe Water Settlement Act of 1992* (106 Stat. §747)" (emphasis added), which includes CAP delivery components. See Section 107(a) (amending section 403(f)(2)(D)(i)(II) of the CRBPA). Both bills also explicitly make funds available for the construction of on-reservation distribution systems for the Yavapai Apache (Camp Verde), Pascua Yaqui, and Tonto Apache Indian tribes along with the Sif Oidak District of the Tohono O'odham Nation." (See Section 107(a)(amending section 403(f)(2)(E) of the CRBPA.)

In addition, SCAT's testimony acknowledges that money from annual appropriations, as well as funds from the Development Fund, will be available to underwrite the cost of these and other Indian distribution systems in Arizona. (p. 14).

"For over 10 years, the San Carlos Apache Tribe has had a settlement in place." (p. 14)

Fact: Unlike other statements in SCAT's testimony, this statement is correct. As discussed above, SCAT's settlement was only made enforceable in December 1999. Nevertheless, for more than 10 years, SCAT has enjoyed the certainty and other benefits it has acquired from its 1992 water settlement, a certainty that it seeks to deny to the Community. At that time, SCAT ensured that it acquired a water supply that is more reliable than other Indian tribes in Arizona can even hope for. SCAT was able to accomplish this by keeping other interested parties in the dark about its intentions and its negotiations until its settlement was included as one of the last titles in largest reclamation project legislation approved by Congress in decades. While SCAT is now championing the virtues of inclusiveness in water settlement negotiation, it did not even attempt to consult with the Community in 1992 or consider the impact of its settlement on the Community's efforts to assert claims to the Salt and Verde Rivers.

J. Gila River Indian Community's settlement CAP water will be substantially used by non-Indians

Fact: SCAT fails to acknowledge that water leases are often an integral component of Indian water rights settlements, including SCAT's 1992 settlement, where they serve a variety of purposes. For example, in the Community's case, it is able to leverage CAP leases in exchange for a greater supply of treated effluent from neighboring cities. Upon close examination the leases and exchanges contemplated by the Settlement Agreement all serve such dual purposes by increasing water use efficiency and/or the reliability of the water provided to the Community. SCAT itself

has leased much of the CAP water it obtained from its 1992 settlement to non-Indian parties.

L. When the CAP canal capacity is not enough to deliver all CAP water orders, GRIC will be the last to be required to take a reduction

Fact: This is simply incorrect. Paragraph 8.14 of the Settlement Agreement, to which the statement by SCAT is directed, simply ensures that GRIC's CAP water deliveries are not reduced based on delivery capacity unless those of "similarly located," CAP water users are also reduced.

N. San Carlos Apache Tribe's Water Rights Settlement Act will likely be impaired

Fact: At the September 30, 2003 joint hearing before the Senate Energy and Natural Resources and Senate Indian Affairs Committees and then before the Water and Power Subcommittee of the House Committee on Resources the Acting Assistant Secretary for Indian Affairs, Aurene Martin, was asked several times whether the Arizona Water Settlements Act violated the federal government's trust responsibility to any Indian tribe. She answered that it did not. The Acting Assistant Secretary provided similar assurances to the House Water and Power Subcommittee of the House Resources Committee.

O. San Carlos Apache Tribe's water supply from Gila River will be further diminished by exchanges of CAP water for Gila River water upstream of tribe's reservation

Fact: The Community has already shown that the UVD agreement will decrease the amount of water used for irrigation in the upper Gila valley. The Community also notes that all exchanges contemplated by the Settlement agreement are subject to full federal environmental review before they are approved by the Secretary. They must also be approved by the Globe Equity Court. The Phelps Dodge agreement explicitly prevents the Secretary from approving the lease/exchange until: "All Environmental Compliance has been completed relating to the United States' execution of the Lease and Exchange Agreement and any litigation relating to such Environmental Compliance is final and subject to no further appeal." In addition, the entire Settlement must be approved in a Special Proceeding before the Gila River Adjudication Court. SCAT will have at least three opportunities to present evidence about any impact associated with these exchanges. Finally, in an effort to ensure that the SCAT current water supply is not simply preserved, but improved both as to quality and quantity, the Community is working actively with other parties to develop a mechanism to provide SCAT with a direct delivery of Gila River water through a pipeline that avoids the salinity of which SCAT complains.

P. San Carlos Apache Tribe's right to power generation benefits of its power site at Coolidge Dam will be diminished

Fact: Any discussion about SCAT's claim of injury based on a loss of electrical power is, of course, academic and speculative at this juncture because no electricity is being produced.

With respect to SCAT's claim that it was inadequately compensated for the construction of Coolidge Dam, this has no relevance to the settlement of water rights disputes concerning the Gila River Indian Community and Tohono O'odham Indian tribes. Whatever the merits of SCAT claims, they only serve to create confusion about unrelated issues. SCAT chose not to press for resolution of this issue when its 1992 settlement was before Congress, perhaps because it did not wish for these issues to interfere with its efforts to enact a water settlement. It should not be entitled to interject these issues at this juncture, at the expense of other Arizona Indian tribes.

IV. THE GRIC SETTLEMENT (S. 437 AND H.R. 885) WILL RESULT IN UNPRECEDENTED ENVIRONMENTAL DEGRADATION TO THE GILA RIVER SYSTEM AND SOURCE AND TO SAN CARLOS LAKE

A. The Gila River system and source as well as San Carlos Lake provide some of the last remaining riparian habitat in Arizona, which must be preserved to ensure the continued existence of many sacred, rare, and federally listed animals and plants

1. The habitat of the Gila River and its tributaries.

Fact: Nothing in the Gila River Indian Water Rights Settlement Act or Settlement Agreement contradicts the provisions of P.L. 101-628 establishing the Gila Box Riparian National Conservation Area.

2. The habitat of San Carlos Lake.

Fact: SCAT's assertions about San Carlos Lake mirror a series of claims that were rejected by the U.S. District Court for Arizona in July 2003. The court found that SCAT had not presented enough evidence of any threats to threatened, endangered, or other species in San Carlos Lake to merit any further consideration of its claims. The court explicitly rejected SCAT's efforts to tie low lake levels to avian botulism. "[T]wo experts with 30 years experience treating injured and diseased raptors, one expert working in Arizona since 1973, have never encountered botulism in Bald Eagles and both stated that Bald Eagles would not likely be impacted by this disease." *SCAT v. United States*, 2003 WL 21697724 (2003 D.Ariz.)

B. The act and agreement will destroy the flows in the Gila River watershed and contaminate its flows through the discharge of treated effluent

Fact: Re-use of highly treated effluent by putting it back into river systems is a recognized mechanism for efficient water use, particularly in water-short areas such as Arizona. Any discharges of such effluent will be governed by both federal and state law, and cannot therefore be characterized as a contaminating pollutant.

Exchanges with Phelps Dodge, ASARCO and New Mexico can only occur after environmental compliance and then only in accordance with Article XI of the Globe Equity Decree.

"The Apache Tribe objects to the SCIDD proposal which cannot fulfill the United States' trust responsibility to the Apache Tribe to preserve and protect San Carlos Lake." (p. 31)

Fact: In July 2003, the U.S. District Court for Arizona addressed each of SCAT's claims that the operation of San Carlos Reservoir and the failure to provide a minimum storage pool breached the federal government's trust obligation to SCAT. The court rejected each of SCAT's allegations, including the allegation that the operation of the dam violates federal laws for the protection of archeological and cultural resources. The court found that SCAT had simply not presented evidence that there was any factual or legal basis to require the government to maintain the minimum project pool. In clear terms, there is no trust responsibility to maintain a minimum lake level.

V. THE GRIC SETTLEMENT EXPRESSLY EXEMPTS ITSELF FROM COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND CONTAINS BROAD AND SWEEPING ENVIRONMENTAL WAIVERS

A. Exemption from NEPA compliance

Fact: SCAT is well-aware that this provision is included in all Indian water rights settlements. For example, it was included in the San Carlos Apache Water Rights Settlement Act of 1992 (3709(a), P.L. 102-575).

B. The GRIC settlement requires the United States to execute broad waivers and releases for past, present, and future environmental harms

Fact: SCAT's comments purposefully ignore the limitations on the scope of the claims the United States will not assert pursuant to 207(c). The only claims the government agrees that it will not pursue are those claims enumerated in 207(a). These are claims that only involve the interests of the Community, its members, and its members as allottees.

VII. THE GRIC SETTLEMENT ACT CREATES A "TEMPLATE" FOR THE LOSS OF TRIBES' FEDERAL RESERVE WATER RIGHTS FOR LANDS TRANSFERRED INTO TRUST

Fact: Indian land and water settlements frequently contain provisions that address or place constraints on future tribal acquisitions of land or water. SCAT has no objection to similar provisions in the Zuni Water Settlement (P.L. 108-34) or in Title III of the Arizona Water Settlements Act.

IX. GLOBE EQUITY DECREE-RIGHTS OF THE SAN CARLOS APACHE TRIBE

A. Federal Globe Equity No. 59 Consent Decree

1. The San Carlos Apache Tribe has federal reserved and aboriginal water right claims pending in the Gila River general stream adjudication for additional water rights to the mainstem of the Gila River which could affect the Globe Equity No. 59 Decree.

Fact: As the testimony before the Committee explained, nothing in the Arizona Water Settlements Act impedes SCAT's effort to assert its reserved water rights claims, just as the Community accepts that SCAT could and did reach settlements with parties asserting claims adverse to the Community's reserved rights claims through the 1992 SCAT settlement legislation. The Community's settlement also

preserves SCAT's ability to object to any provision in its settlement in federal and state court before the Community's settlement would become effective. It also preserves SCAT's ability to object in court as to any of the possible exchanges contemplated by the Community's settlement.

2. The Globe Equity No. 59 Court has entered a water quality injunction against the Gila Valley and Franklin Irrigation District to ensure that the San Carlos Apache Tribe receives that quality of water necessary to cultivate moderately salt-sensitive crops.

Fact: Nothing in the Community's settlement framework interferes with the water quality injunction, which, as discussed above, concerns only salinity from within the Gila River Valley.

3. Standard for construing the Globe Equity Decree.

4. Previous rulings by the Globe Equity Court and the Ninth Circuit confirm that UVD pumping is "covered" by the decree.

The Community has no specific comments on these sections of SCAT's testimony, which recite SCAT's interpretation of certain laws and court rulings. SCAT's generalized views on these topics are simply not relevant to the Committee's consideration of the Arizona Water Rights Settlements Act. As noted above, because SCAT retains all its existing rights and claims, it can vigorously pursue the enforcement of such rights and claims using such interpretations as a basis for its actions.

B. The Arizona Gila River General Stream Adjudication

1. The San Carlos Apache Tribe has unadjudicated federal reserved and aboriginal water right claims to waters of the mainstem and tributaries of the Gila River in the Arizona Gila River General Stream Adjudication.

Fact: Under the Arizona Water Settlements Act, the Community will not seek to increase the reserved rights available to it in the Gila River. Nothing in the proposed legislation interferes with SCAT's right or ability to attempt to increase its reserved rights through litigation or separate settlement.

Statement submitted for the record by Keno Hawker, Mayor, City of Mesa, Arizona

Chairman Calvert and members of the Subcommittee; as the Mayor of the City of Mesa, Arizona, I appreciate the opportunity to submit this testimony in support of H.R. 885. The City of Mesa provides water service to approximately 435,000 people in four cities and across two counties. The importance of H.R. 885 to Mesa, its customers, and other water users throughout Arizona cannot be underestimated.

You will hear a great deal of testimony about the benefits of the Arizona Water Settlements Act. You will hear talk of the stability, certainty in water resources planning, cessation of costly litigation, and reduced CAP repayment obligation that the settlement brings to the State of Arizona. You will hear of the benefits the settlement brings to the federal government, including an increased share of CAP water that can be used by the federal government to meet its trust responsibilities towards the many Native American communities within Arizona. The City of Mesa shares in these important benefits and values them greatly, but I want to emphasize the value of some of the unique benefits that the City of Mesa in particular realizes from this Act.

Through this settlement and its enabling legislation, Mesa will receive an additional allocation of 7,115 acre-feet per year of CAP M&I priority water that is vital to ensuring Mesa's sustainable growth and development. Mesa also will gain the option to lease Gila River Indian Community CAP water in the future, again adding to the pool of water Mesa can use for its future.

Most importantly, however, the City of Mesa is undertaking a water exchange with the Gila River Indian Community. Mesa will deliver 29,400 acre-feet per year of high quality reclaimed water to the reservation boundary and in exchange will receive 23,530 acre-feet of CAP water that Mesa can use in its potable system. This exchange is essential to the City of Mesa. The exchange affords Mesa the opportunity to efficiently convert what is a non-drinking water source into a drinking water resource that can be used to meet growing municipal and industrial demands. The exchange allows the Gila River Indian Community to increase the size of its water budget and use this high quality water for agricultural purposes at a very low price. Mesa has a history of partnership with its neighbor the Gila River Indian Community in the redevelopment of what was Williams Air Force Base, and strongly values the opportunity to partner again with the Community in a project that can bring so many benefits to both communities. The proposed reclaimed water ex-

change allows both entities to manage water in a regional, conjunctive, and efficient manner that brings great benefits to the residents of both communities.

For these reasons and others, the City of Mesa strongly endorses the Arizona Water Rights Settlements Act and urges your support of H.R. 885.

Thank you for the opportunity to provide written testimony.

**Statement submitted for the record by Douglas Mason, General Manager,
San Carlos Irrigation and Drainage District, Coolidge, Arizona**

Chairmen Calvert and Members of the Subcommittee, the San Carlos Irrigation and Drainage District (District) is pleased to submit this testimony supporting the enactment of H.R. 885, the Arizona Water Settlements Act. Our support for enactment reflects the efforts of many parties that have collaborated to bring this settlement to the point where the Congress can consider enactment of the authorizing legislation. Of particular note are the efforts of the Arizona Congressional delegation, who have been instrumental in bringing the parties together to structure innovative solutions to what had been considered to be intractable disputes.

Although the broad fabric of the Settlement is complete, two areas continue to be completed through ongoing negotiations. These include: (1) finalization of arrangements for water users in New Mexico to use the 18,000 acre-feet per year of Central Arizona Project water that was promised in the 1968 Colorado River Basin Project Act; and (2) completion of agreement language defining the rights of water users in the Upper Gila River valleys near the communities of Duncan and Safford in western New Mexico and eastern Arizona. This District is participating in those discussions. With conclusion of those two items and any necessary conforming changes to the Settlement Agreement and the legislation, the Bill will be ready for enactment.

From the perspective of this District, the Settlement accomplishes important objectives. They include:

1. Resolves decades of difficulties between District farmers and members of the Gila River Indian Community (Community) over how the Gila River water rights shared by the District and the Community are managed; this is accomplished by restructuring and simplifying how San Carlos Irrigation Project (Project) water is divided;
2. Vests in the District and the Community, through a Joint Control Board, operation and maintenance responsibility for the Project irrigation water delivery facilities;
3. Provides for the rehabilitation of Project irrigation water delivery facilities using moneys available in the Lower Colorado River Basin Development Fund that is to be made available through contracts between (1) the United States and the Community and (2) the United States and the District;
4. Provides that the District will use its available contracting authorities and workforce to cost-effectively complete the rehabilitation of all District and most Project Joint Works facilities;
5. Provides that 8,000 acre-feet per year of water conserved through rehabilitating District facilities will be made available to maintain a sustainable water supply for a minimum Project fish and wildlife pool in the San Carlos Reservoir;
6. Provides an option for the United States to use, for a future water rights settlement with the San Carlos Apache Tribe, an average of 10,000 acre-feet per year of water conserved through rehabilitating District facilities; and.
7. Provides that the District will assume the obligation to repay that portion of District facility rehabilitation costs that are associated with the net new conserved water supplies received by the District and, further, provides that remaining costs will be non-reimbursable because the beneficiaries of those investments are tribal entities and fish and wildlife resources.

In conclusion, the San Carlos Irrigation and Drainage District supports enactment of H.R. 885 because it resolves historical disputes and establishes mechanisms where future disagreements can be resolved among the local interested parties without needing to involve the United States in such management decisions.

Along with myself, our General Counsel, Riney B. Salmon II, and our Engineering Consultant, Michael J. Clinton, will attend the Committee Hearing. We would be pleased to address any questions that arise about District participation in the Arizona Water Settlements Act and the associated Settlement Agreement.

Thank you for considering this testimony.

[A letter submitted for the record by the City of Payson, Arizona, follows:]

Statement of
The Mayor and Common Council of
The Town of Payson, Arizona

Before the Subcommittee on Water and Power
House Resources Committee

Concerning
H.R. 885 - Arizona Water Settlements Act
October 2, 2003

CHAIRMAN CALVERT AND MEMBERS OF THE SUBCOMMITTEE:

The Town of Payson, Arizona, appreciates the opportunity to express its support for H.R. 885. The Town is a community of 14,500 residents, which is located an hour's drive northeast of the Phoenix metropolitan area in the scenic and cool pine country below the Mogollon Rim. Its climate and exquisite setting offer abundant blessings, in sharp contrast to the limited water supply available to the Town from the fractured granite aquifer underlying it. For decades the Town has strained to be a responsible steward of the water resources at its disposal, but the time is fast approaching when there simply will not be enough water to meet the demand.

The Town is especially pleased that H.R. 885 would confirm and ratify a settlement agreement facilitating an eventual transfer of Blue Ridge Dam and related facilities and water rights to the Salt River Federal Reclamation Project. It realizes that this transfer is not assured even if the legislation passes, and that such a transfer would be only the first of many important steps needed to make water from Blue Ridge Reservoir available to meet the Town's water supply needs. The Town has done what it can within its own governing structure, however, and it is critical that progress be made toward securing a renewable water supply.


We commend Representative Rick Renzi, his staff, and the parties to the settlement for their dedication. We urge this Subcommittee, the House Resources Committee, and the full House to give H.R. 885 favorable consideration.

Thank you for considering our views.

THE TOWN OF PAYSON, ARIZONA


By Barbara Brewer, Vice Mayor

ATTEST:


Gaye Stidham, Deputy Town Clerk
for Silvia Smith, Town Clerk

Statement submitted for the record by George Renner, President, Board of Directors, Central Arizona Water Conservation District

Chairman Calvert and Members of the Subcommittee, the Central Arizona Water Conservation District is pleased to offer the following testimony regarding H.R. 885, the Arizona Water Settlements Act.

The Central Arizona Project or "CAP" was authorized by the 90th Congress of the United States under the Colorado River Basin Project Act of 1968 (Basin Project Act). The CAP is a multi-purpose water resource development project consisting of

a series of canals, tunnels, dams, and pumping plants that lift water nearly 3,000 feet over a distance of 336 miles from Lake Havasu on the Colorado River to the Tucson area. The project was designed to deliver the remainder of Arizona's entitlement to Colorado River water into the central and southern portions of the state for municipal and industrial, agricultural, and Indian uses. The Bureau of Reclamation (Reclamation) initiated project construction in 1973, and the first water was delivered to central Arizona in 1985. In 2000, CAP delivered its full normal year entitlement of 1.5 million acre-feet for the first time, allowing Arizona to utilize its full Colorado River apportionment of 2.8 million acre-feet.

CAWCD was created in 1971 for the specific purpose of contracting with the United States to repay the reimbursable construction costs of the CAP that are properly allocable to CAWCD, primarily non-Indian water supply and commercial power costs. In 1983, CAWCD was also given authority to operate and maintain completed project features. CAWCD's service area is comprised of Maricopa, Pima, and Pinal counties, and includes the state's major metropolitan areas of Phoenix and Tucson. CAWCD is a tax-levying public improvement district, a political subdivision and a municipal corporation, and represents roughly 80% of the water users and taxpayers of the State of Arizona. CAWCD is governed by a 15-member Board of Directors elected from the three counties it serves. CAWCD's Board members are public officers who serve without pay.

Project repayment is provided for through a 1988 Master Repayment Contract between CAWCD and the United States. Reclamation declared the CAP water supply system (Stage 1) substantially complete in 1993, and declared the regulatory storage stage (Stage 2) complete in 1996. No other stages are currently under construction. Project repayment began in 1994 for Stage 1 and in 1997 for Stage 2. To date, CAWCD has repaid \$685 million of CAP construction costs to the United States.

In 2000, CAWCD and Reclamation successfully negotiated a settlement of their \$500 million dispute regarding the amount of CAWCD's repayment obligation for CAP construction costs. That dispute had been the subject of ongoing litigation in United States District Court in Arizona since 1995. The settlement includes a number of conditions that must be satisfied before it will become final, including completion of Indian water rights settlements for the Gila River Indian Community and Tohono O'odham Nation. Several of those conditions are addressed in H.R. 885.

Title 1—Central Arizona Project Settlement Act

Title 1 of H.R. 885 resolves a long-standing dispute between the United States and the State of Arizona regarding the allocation of CAP water. Title 1 also provides the water supplies and funding source that are necessary to complete Indian water rights settlements for the Gila River Indian Community (Title 2), the Tohono O'odham Nation (Title 3), and other Arizona tribes.

CAP WATER FOR INDIAN SETTLEMENTS

Congress authorized the Central Arizona Project for the stated purposes of reducing groundwater overdraft, maintaining as much of central Arizona's irrigated agriculture as possible, and providing additional water for future municipal and industrial use. H.R. Rep. No. 1312, 90th Cong., 2d Sess. 55 (1968). There is scant mention of any intended CAP benefits for Indian tribes in the legislative history of the Basin Project Act.

Nevertheless, by 1983 the Secretary of the Interior (Secretary) had allocated 309,828 acre-feet of CAP water to Indian tribes and entered into long-term contracts with tribes for much of that supply. That represented about 22 percent of the anticipated annual CAP supply. Arizona Indian water rights settlements completed since 1983 have increased the amount of CAP water allocated to Indian tribes and decreased the amount available for non-Indian use. Presently, 453,224 acre-feet of CAP water—32 percent of the CAP supply—is under contract to Indian tribes or dedicated for use in Indian settlements.

The Arizona Water Settlement Agreement (Agreement) among the United States, CAWCD and the Arizona Department of Water Resources, which would be ratified by H.R. 885, would make an additional 214,500 acre-feet of CAP water available for use by Indian tribes. Most of this additional water would come from non-Indian agricultural water users. A total of 293,795 acre-feet of non-Indian agricultural CAP water is being sought under the Agreement. Two-thirds of this water would be used to facilitate pending and future Indian water rights settlements; one-third would go to the State of Arizona for future municipal and industrial use.

With the additional water provided under the Agreement, a total of 667,724 acre-feet of CAP water—47 percent of the total CAP supply—would be available for Indian use. H.R. 885 provides that this division of the CAP supply is final. This is a key element of the settlement legislation for non-Indian CAP water users. Some

have suggested that even more CAP water should be allocated for Indian use, but any change in the division of CAP water from that reflected in H.R. 885 would require amendment of both the Agreement and the CAP repayment settlement. CAWCD is a party to both of those agreements, and CAWCD will not accede to any further reduction in the non-Indian CAP supply.

No central Arizona Indian tribe has a Winters right claim to CAP water, and the rights of mainstream tribes to Colorado River water were adjudicated in *Arizona v. California*. Nevertheless, under H.R. 885 the Secretary would have a pool of 67,300 acre-feet of CAP water to use in future Arizona Indian water rights settlements. That is the only CAP water that will be available for future Indian settlements. Accordingly, it is imperative that the Secretary only be permitted to reallocate this water as part of a final Indian water rights settlement, as provided in section 104(b) of H.R. 885.

As noted, the CAP water to be reallocated under H.R. 885 would come from non-Indian agriculture. Non-Indian agricultural water users with long-term contract entitlements to CAP water will be encouraged to permanently relinquish their long-term rights to CAP water. As partial compensation, the Agreement provides that the non-Indian agricultural contractors would be relieved from the federal debt they incurred under section 9(d) of the Reclamation Project Act of 1939. (Those contractors would remain responsible for repaying any private bond debt.) Collectively, their 9(d) debt totals more than \$158 million. Under the Agreement, CAWCD will pay about \$85 million of that debt and the United States will forgive \$73.5 million. Section 106 of H.R. 885 makes the 9(d) debt that the United States has agreed to forgive non-reimbursable and non-returnable.

Section 106 also exempts land within the CAP service area from the Reclamation Reform Act and any other acreage limitation or full cost pricing provision of federal law. The Central Arizona Project was constructed to provide a renewable water supply to agriculture to alleviate the significant groundwater overdraft in central Arizona. By limiting the agricultural lands that may receive CAP water, the Reclamation Reform Act operates to increase groundwater pumping in central Arizona. Thus, the exemption in section 106 is appropriate to help the CAP achieve its mission. This exemption also satisfies a condition to the relinquishment of the CAP non-Indian agricultural entitlements.

Title 1 also prohibits the transfer or use of any CAP water outside the State of Arizona, except in the context of the interstate water banking program already established under regulations adopted by the Secretary. Title 1 also directs the Secretary to reallocate 65,647 acre-feet of currently uncontracted CAP M&I water to M&I water providers in Arizona. Both of these provisions are essential to CAWCD and its water users.

FUNDING—FOR INDIAN WATER RIGHTS SETTLEMENTS

To provide a funding source for Indian water rights settlements, Title 1 amends section 403(f) of the Basin Project Act to allow additional uses of certain funds deposited into the Lower Colorado River Basin Development Fund (Fund). The Fund is a separate fund within the U.S. Treasury established by Congress under the Basin Project Act, which authorized construction of the CAP. Revenues deposited into the Fund come from a number of sources, including: the sale of power from the Navajo Generating Station that is surplus to CAP pumping needs; a surcharge on power sold in Arizona from Hoover Dam and (beginning in 2005) Parker and Davis Dams; and other miscellaneous revenues from operation of the CAP. Under existing law and contract, these revenues are paid each year to the general fund of the Treasury to return the CAP construction costs that are reimbursable by CAWCD. To the extent that Fund revenues are insufficient to meet CAWCD's annual repayment obligation, CAWCD makes up the difference with a cash payment to the United States, which is also deposited into the Fund.

Title 1 does not affect the collection and deposit of revenues to the Fund. Nor does it affect CAP repayment or alter CAWCD's obligation to make cash payments sufficient to meet its annual repayment obligation for the CAP. Under Title 1, monies in the Fund will still be credited first against CAWCD's annual repayment obligation. But instead of being returned to the general fund, those funds may also be used each year, without further appropriation, to pay certain costs of delivering CAP water to Indian tribes, constructing distribution systems to deliver CAP water to Indian tribes, and other costs authorized under Titles 2 and 3 of H.R. 885.

Title 2—Gila River Indian Community Water Rights Settlement Act

Title 2 authorizes, ratifies and confirms a settlement of the water rights claims of the Gila River Indian Community (Community) that has been more than a decade in the making. This agreement is a significant step forward for Arizona that will

settle longstanding litigation over the Community's water rights and provide much-needed certainty for state water management.

Of particular importance to CAWCD, Title 2 prohibits the lease, exchange, forbearance or transfer of CAP water in any way by the Community for use outside the State of Arizona.

Title 3—Southern Arizona Water Rights Settlement Amendments Act

Title 3 resolves remaining disputes related to the Southern Arizona Water Rights Settlement Act, which was enacted by Congress in 1982 to settle the water rights claims of the Tohono O'odham Nation (Nation). Like the Community in Title 2, the Nation is expressly prohibited from leasing, exchanging, forbearing or transferring any of its CAP water for use outside the State of Arizona.

Conclusion

CAWCD strongly supports H.R. 885 as introduced. This legislation represents the culmination of years of effort by central Arizona water users in an open and inclusive process to resolve Indian water rights claims by negotiation rather than litigation. Passage of H.R. 885 will help bring closure to many longstanding disputes involving Arizona's water supplies.

**Statement submitted for the record by The Honorable Skip Rimsza,
Mayor, City of Phoenix, Arizona**

Chairman Calvert and Members of the Subcommittee:

The City of Phoenix, an incorporated municipality within Maricopa County, Arizona, greatly appreciates the opportunity to offer testimony in support of the Arizona Water Settlements Act, H.R. 885, which settles the long-standing water rights claims of the Gila River Indian Community and disputes over water allocations and costs of the Central Arizona Project. The Settlement Act provides many benefits to Arizona Indian tribes, the federal government, the State of Arizona and the City of Phoenix, both directly and indirectly.

The linchpin of the Act is Title I, the Central Arizona Project Settlement. Title I settles disputes between the federal government and the State of Arizona over repayment obligations for the Central Arizona Project (CAP). It also divides CAP water between state and federal purposes. Most importantly, it provides a framework for the Gila River Indian Community Water Rights Settlement and future Indian water rights settlements in Arizona by providing funding sources and identifying water supplies that can be used to fill water budgets for those settlements. It also insures that precious Colorado River water will remain within the State and be used for the benefit of its citizens. The State, Indian tribes and federal government all reap rewards from settlements.

Title I provides for long-term contractual commitments of CAP water to be capped at 1,415,000 acre-feet with 667,724 acre-feet going to Arizona Indian Tribes and the federal government. The remainder of the entitlement, 747,246 acre-feet goes to the State and non-Indian water users. The split of this entitlement is used as the basis of the State's repayment obligation for the Central Arizona Project. Agreement between the State of Arizona, the federal government and Arizona Indian tribes on this point is a major accomplishment that only could have come to closure in the context of the overall settlement package authorized in this bill.

The reallocation to Arizona's Municipal and Industrial CAP water users in the amount of 65,500 acre-feet has been a hotly debated issue between water users in the State of Arizona, the federal government and Arizona Indian Tribes. Title I provides that the City of Phoenix shall receive 8,206 acre-feet of CAP water from this pool. The City will pay over \$500,000 in back capital charges to the Central Arizona Water Conservation District (CAWCD) when that reallocation is finalized. This is a critical component of the Arizona Water Settlements Act for the City of Phoenix. Other important provisions include the extension of the City's CAP subcontract for an additional 100 years, recognition that the contract is for permanent service and the creation of a formula for sharing CAP water between federal and non-federal water users in the event a shortage of Colorado River water for the Lower Basin States is declared. The City is not alone in the receipt of these benefits; they are available to all CAP subcontractors within Arizona.

The identification of water supplies for Arizona Indian tribes now, in the case of the Gila River Indian Community (Community) and in the future for Indian Tribes with unfulfilled water rights claims, will benefit tribes, the federal government and the State of Arizona. The ability to facilitate settlement of these claims is critical to the continued vitality of the State. Settlement of these claims will provide certainty and will avoid costly and protracted legal battles over water resources. Per-

haps the most important provision of the entire bill is Section 107 of the Act which: (1) amends the Colorado River Basin Project Act to allow for revenues deposited into the Lower Colorado River Basin Fund to be credited against the repayment obligation for the Central Arizona Project; (2) provides funding for the Gila River Indian Community and the Tohono O'odham Nation settlements; (3) allows the federal government to meet its obligations to fund Indian tribes' operation and maintenance costs for CAP water deliveries to tribes; (4) provides funds for construction of critical water delivery infrastructure for Indian tribes; and (5) creates a mechanism to fund future Indian water settlements. This part of the Act provides an enormous collective benefit to the tribes, the federal government and for the State of Arizona and is an example of the forward thinking that went into the settlement package.

Title II, the Gila River Indian Community Water Rights Settlement, is the culmination of many years of intensive negotiations. The settlement is fair and equitable for the GRIC, the State of Arizona, the federal government and local municipal, corporate, agricultural, and private parties and was achieved only with tremendous amounts of give-and-take on all sides. The Indian Community is a reservation of over 350,000 acres located within Maricopa and Pinal Counties. The reservation is located immediately south of the City of Phoenix and shares a common border with the City of Phoenix of approximately twenty-two miles in length. It is the city's largest neighbor in terms of land area. The City of Phoenix has a population of over 1.4 million people. This settlement agreement has many benefits for both the Gila River Indian Community and the City of Phoenix. The success of the settlement negotiations has also opened up many doors between the two communities on other important issues as well, and successful passage of the Water Settlement Agreement and implementation of the settlement agreement will further enhance future cooperative efforts between the Gila River Indian Community and the City of Phoenix.

To provide some background to the settlement, the City and the Gila River Indian Community have been engaged in longstanding disputes over the rights to Arizona's most scarce and precious natural resource, water. The City and the Community are not alone in this regard. These disputes involve significant claims to water by surrounding cities and towns, the State of Arizona and the federal government. The settlement, which the City helped craft provides resolution for all these claims in a fair and equitable manner to all parties, including the federal government.

The nature and extent of the disputes deserves some explanation. The Indian Community primarily sits astride the Gila River. A portion of the Community also sits along the Salt River, a primary tributary to the Gila River. The Community contends that it has been denied by its neighbors, as well as by the actions and inactions of the federal government, to its fair share of the surface waters of the Gila River. More importantly to Phoenix, the Community claims that its fair share of the Salt River has been negatively impacted as well. For many years, the City of Phoenix has relied upon its water rights to the Salt River and its tributaries, through deliveries by the Salt River Project, for over 60% of its total water supplies.

The Community also claims that its groundwater resources have also been unduly impacted by pumping that occurs off the reservation. Numerous lawsuits against parties in the State, including Phoenix, have been filed by the Community and by the federal government on behalf of the Community.

Without this legislation the settlement will not become effective, and the parties including the federal government, will be forced to continue to litigate their disputes in court. A general stream adjudication to the rights of the Gila River and all its tributaries, the Gila River Adjudication, has been underway in Arizona since the 1970's. Without this bill the Community, the federal government and thousands of state parties will continue to have to assert and defend their claims in an expensive and lengthy process. This settlement solves that problem as well.

There is a clear need for settlement of all these disputes. This settlement is appropriate and it is fair to all parties including the federal government and the Indian Community. All parties have been well represented in negotiating it. The City of Phoenix, for its part, has given up some of its Salt River water supplies, for the benefit of the GRIC. The City will also lease 15,000 acre-feet per year of the Community's CAP water supply at an up-front cost of over \$20,000,000. Congressional authority for the Community to lease its water is necessary and that authority is contained in this bill. Phoenix's contributions to the settlement package are significant as are the contributions of the other parties in Arizona. Reciprocal waivers of claims between the Community, the federal government and the City of Phoenix and other state parties are also a key part of this legislation and are a vital component of the settlement.

In summary, the City of Phoenix believes the Arizona Water Settlement Act is a fair, equitable and cost-effective solution for the settlement of financial and water

claims for the benefit of the State of Arizona and its citizens, Arizona Indian tribes and the federal government and urges its enactment.

Statement submitted for the record by John F. Sullivan, Associate General Manager, Water Group, Salt River Valley Water Users Association and Salt River Project Agricultural Improvement and Power District, on H.R. 885

Chairman Calvert, and members of the Subcommittee:

Thank you for the opportunity to submit testimony in support of H.R. 885, the Arizona Water Settlements Act. My name is John F. Sullivan. I am the Associate General Manager, Water Group, of the Salt River Project ("SRP"), a large multi-purpose federal reclamation project embracing the Phoenix, Arizona metropolitan area. SRP is composed of the Salt River Valley Water Users' Association ("Association") and the Salt River Project Agricultural Improvement and Power District ("District"). Under contract with the federal government, the Association, a private corporation authorized under the laws of the Territory of Arizona, and the District, a political subdivision of the State of Arizona, provide water from the Salt and Verde Rivers to approximately 250,000 acres of land in the greater Phoenix area. Over the past century, most of these lands have been converted from agricultural to urban uses and now comprise the core of metropolitan Phoenix.

The Association was organized in 1903 by landowners in the Salt River Valley to contract with the federal government for the building of Theodore Roosevelt Dam, located some 80 miles northeast of Phoenix, and other components of the Salt River Federal Reclamation Project. SRP was the first multipurpose project approved under the Reclamation Act of 1902. In exchange for pledging their land as collateral for the federal loans to construct Roosevelt Dam, which loans have long since been fully repaid, landowners in the Salt River Valley received the right to water stored behind the dam.

In 1905, in connection with the formation of the Association, a lawsuit entitled *Hurley v. Abbott, et al.*, was filed in the District Court of the Territory of Arizona. The purpose of this lawsuit was to determine the priority and ownership of water rights in the Salt River Valley and to provide for their orderly administration. The decree entered by Judge Edward Kent in 1910 adjudicated those water rights and, in addition, paved the way for the construction of additional water storage reservoirs by SRP on the Salt and Verde Rivers in Central Arizona.

Today, SRP operates six dams and reservoirs on the Salt and Verde Rivers in central Arizona, as well as 1,300 miles of canals, laterals, ditches and pipelines, groundwater wells, and numerous electrical generating, transmission and distribution facilities. The six SRP reservoirs impound runoff from a 13,000-square mile watershed. The water stored in these reservoirs is delivered via SRP canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area. SRP also operates approximately 250 deep well pumps to supplement surface water supplies available to the Phoenix area during times of drought. In addition, SRP provides power to nearly 800,000 consumers in the Phoenix area, as well as other rural areas of the State.

SRP holds the rights to water stored in its reservoirs, and for the downstream uses they supply, pursuant to the state law doctrine of prior appropriation, as well as federal law. Much of the water used in the Phoenix metropolitan area is supplied by these reservoirs.

SRP fully supports the enactment of H.R. 885 in its entirety. However, my testimony, offered today on SRP's behalf, is specifically directed to Title II of the bill, authorizing the Gila River Indian Community Water Rights Settlement.

The Gila River Indian Reservation was created by an Act of Congress in 1859 and was enlarged by seven separate Executive Orders in 1876, 1879, 1882, 1883, 1911, 1913 and 1915. Currently, the Reservation encompasses approximately 377,000 acres of land in central Arizona. Most of the lands within the Reservation are located within the Gila River watershed. The water rights appurtenant to these lands are subject to a consent decree entered by the United States District Court in 1935. The 1935 "Globe Equity Decree" adjudicated the rights to water from the main stem of the Upper Gila River above its confluence with the Salt River. The Decree entitles the United States, on behalf of the Indians of the Gila River Reservation, to divert 300,000 acre-feet of water annually from the Gila River. Historically, however, the Indian Community has received, on average, only about 100,000 acre-feet annually of its decreed entitlement, due to insufficient flows in the Gila River at the Reservation's diversion point.

A small portion of the Gila River Indian Reservation lies within the Salt River watershed, west of Phoenix and several miles downstream from SRP's reservoirs. Many of these lands were added to the Reservation in 1879. At that time, a group of Indians, commonly referred to as the Maricopa Colony, was living there. Since some time prior to 1900, these Indians diverted water from the Salt River for the irrigation of approximately 1,000 acres.

In 1901, the federal government, acting on behalf of the Maricopa Indians, brought suit in Arizona territorial court to stop nearby non-Indian irrigators from interfering with the waters used by the Indians. Some of the defendants named in the suit later became shareholders of the Association, after its incorporation in 1903. On June 11, 1903, Judge Kent issued the decree in *United States v. Haggard*, which adjudicated the Maricopa Indians' right to irrigate approximately 1,080 acres of land with water from the Salt River. In 1917, the Haggard decree was incorporated into the Benson-Allison decree, which also adjudicated water rights for lands not included in the original decree, located near the confluence of the Salt and Gila Rivers.

Other than the approximately 1,080 acres irrigated by the Maricopa Colony, and included in the Haggard and Benson-Allison decrees, no lands on the Gila River Indian Reservation have ever been directly irrigated using Salt River water. Despite this fact, in the mid-1980s, the Gila River Indian Community asserted claims for the Reservation in the pending Gila River Adjudication to approximately 1.8 million acre-feet of water annually from the Salt, Verde and Gila Rivers. More recently, the Indian Community amended its claims and now asserts the right to more than 2.7 million acre-feet of water annually from the Gila River, its tributaries and groundwater. These claims, which far exceed the combined annual flow of all of these rivers, are based on the federal reservation of rights doctrine and largely encompass potential future uses of water by the Indian Community on its Reservation.

Thus far in the Adjudication, the Community's attempts to prosecute its extremely large claims to the Salt and Gila Rivers have not met with success. The Superior Court in the adjudication recently concluded that the Community and the United States are estopped by a decision of the United States Court of Claims, entered decades ago, from asserting any claim to the Salt River other than for the 1,490 acres within the Maricopa Colony. An earlier decision of the Superior Court would limit Reservation lands within the Gila River watershed to their decreed entitlement under the Globe Equity Decree. The Indian Community and the United States have appealed both of these decisions of the trial court, and the Arizona Supreme Court is presently considering whether to accept review of these decisions. In the absence of the Settlement before this Subcommittee today, the matter is likely to continue in litigation for some time. In the meantime, the uncertainty associated with the potential magnitude of the Community's rights to water from the Salt and Verde Rivers poses a threat to the rights of existing appropriators, including SRP.

In order to alleviate this uncertainty and assure the dependability of water supplies to the more than 3 million residents of Maricopa County in central Arizona, SRP initiated water settlement negotiations with the Indian Community and the United States in 1989. Over time, neighboring water users joined the negotiations, which were often complex and difficult. Fourteen years later, the Indian Community, the United States and local interests including SRP, spurred on by the leadership of Senator Kyl and former Secretary Babbitt, have reached a comprehensive settlement of the Community's water rights claims, benefiting water users throughout the Gila River Basin, in Maricopa, Pinal and Yavapai Counties. The settlement is embodied in the Settlement Agreement and legislation before this Subcommittee today.

The Settlement resolves all outstanding water-related litigation between the Gila River Indian Community and the other settling parties and settles, once and for all, the water rights of the Indian Community to surface water and ground water in the Gila River Basin. I have attached a summary of the components of the Settlement to my written testimony. However, a few important points, pertaining to the Community's use of Salt and Verde River water, will be discussed here.

First, The Settlement recognizes the right of the United States, the Community, its members and allottees under the Haggard Decree, as modified by the Benson-Allison Decree, to 540 miners inches of water from the Salt River. The Settlement also confirms that such rights shall be deemed fully satisfied by SRP's performance of its water delivery obligations under the Contract between the United States and the Salt River Valley Water Users' Association dated May 5, 1936, as amended. This Contract, commonly referred to as the Maricopa Contract, provides that SRP shall make available 5,900 acre-feet of water per year for diversion and use on Reserva-

tion lands with rights under the Haggard Decree, as modified by the Benson-Allison Decree.

Second. Under the Settlement, the Community also shall have an annual entitlement to SRP stored water in an amount varying from zero to 35,000 acre-feet, depending on SRP reservoir storage levels on May 1 of each year. The water will be transported to the Reservation via SRP's water delivery system, subject to certain delivery system capacity limitations specified in the Agreement. Water that is credited to the Community on May 1 of each year, but is not used by April 30 of the following year, may be carried over in storage for the Community's subsequent use, up to a maximum amount, specified in the Agreement, which may not be exceeded at any time. Moreover, in any single year, the Community will not be entitled to order more than 45,000 acre-feet total from the current year's entitlement and the Community's entitlement to "carry over" water from prior years. The Community will pay for the delivery of SRP stored water at 100 percent of the cost per acre-foot of stored water for SRP shareholders. The Community's entitlement to SRP stored water will be phased in over a period of five-years, commencing in the year that the Settlement becomes enforceable.

Third. Subject to certain monthly and annual volume limitations, SRP has agreed to take delivery of CAP water to which the Community is entitled for use by SRP shareholders, in exchange for the storage of the same amount of Salt and Verde River water in SRP reservoirs for eventual use by the Community. This exchange is subject to the ability of SRP to divert and beneficially use the CAP water to which the Community is entitled. SRP will deliver exchange water ordered by the Community via the SRP water delivery system only after determining that the system capacity is not needed to fulfill water delivery obligations of SRP that predate the Settlement.

Fourth. SRP has agreed to accept delivery of CAP water to which the Community is entitled for direct delivery to the Reservation, via SRP's water delivery system. The direct delivery of this water to the Community also will be subject to the limits of SRP's water delivery system capacity, as discussed in the previous paragraph.

Fifth. Phelps Dodge Corporation has offered to transfer to SRP its right, title and interest in Blue Ridge Reservoir, including all rights to water developed by operation of the reservoir. If SRP accepts Phelps Dodge's offer, and the transfer of water rights to SRP is accomplished under Arizona law, then SRP will provide to the Community a portion of the water stored behind Blue Ridge Reservoir, ranging from zero to 836 acre-feet annually, depending on reservoir storage levels in Blue Ridge on May 1 of each year. Water that is credited to the Community on May 1 of each year, but is not used by April 30 of the next year will not be available for the Community's use in subsequent years. If SRP accepts Phelps Dodge's offer and obtains the right to water stored in Blue Ridge, there also may be an opportunity for municipalities in water scarce areas of Gila County, Arizona, to enter into agreements with SRP for the use of some of this water.

Sixth. The Settlement permits the continued use by the Community of water discharged into certain drain ditches by SRP, and provides for the contribution by SRP of \$500,000 toward the cost of easements, construction, rehabilitation, operation and maintenance of these drain ditches on the Reservation.

Seventh. In exchange for these and other benefits to the Community, its members and allottees, the Settlement provides for the execution of a permanent, comprehensive waiver of the claims of these parties, and the United States on their behalf, for water rights, injuries to water rights and injuries to water quality, among others, as provided in exhibits to the Settlement Agreement. Of greatest significance, the waiver of all water rights claims by the Community, its members and allottees, and the United States on their behalf, extends to all water users in the Gila River Basin, including users who are not parties to the Settlement Agreement. Other parties to the Settlement Agreement will also execute waivers and releases of claims that these parties may have against the Community, its members and allottees, or the United States on their behalf, as specified in the Settlement Agreement.

In conclusion, we support the passage of H.R. 885, which is the culmination of the efforts of many people, over almost 15 years, to resolve these difficult issues regarding the allocation of an extremely scarce resource. Enactment of H.R. 885 is crucial to achieving certainty among users in central Arizona regarding water rights, and the dependable allocation of water supplies for the foreseeable future. We therefore strongly urge this Subcommittee to recommend passage of the bill to the full House.

ARIZONA WATER SETTLEMENTS ACT

TITLE II—GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT
 BRIEFING PAPER/ATTACHMENT TO TESTIMONY OF JOHN F. SULLIVAN, SALT RIVER
 PROJECT PREPARED BY SALMON, LEWIS & WELDON, P.L.C., ON BEHALF OF SALT
 RIVER PROJECT

HISTORY OF WATER RIGHTS ISSUES PERTAINING TO THE
 GILA RIVER INDIAN RESERVATION.

The Gila River Indian Reservation was created by an Act of Congress in 1859 and was enlarged by seven separate Executive Orders in 1876, 1879, 1882, 1883, 1911, 1913 and 1915. Currently, the Reservation encompasses approximately 377,000 acres of land in central Arizona. Most of these lands are located in the Gila River watershed. A small portion of the 1879 enlargement, however, borders the Salt River near its confluence with the Gila River.

In approximately 1872, upstream settlers in the Safford Valley (presently the Gila Valley Irrigation District), Duncan-Virden Valley (presently the Franklin Irrigation District) and in the Florence-Casa Grande area (presently the San Carlos Irrigation and Drainage District) ("SCIDD") began settling upstream of the Reservation and diverting water from the Gila River for irrigation. These diversions had the effect of reducing the quantities of Gila River water available to the Indian Community for downstream diversion. In 1924, in an attempt to obtain a more dependable source of water for the Indian Community, the United States Congress authorized the construction of Coolidge Dam as the principle feature of the San Carlos Irrigation Project ("SCIP"). Pursuant to the 1924 Act, and a separate agreement between the government and private landowners within the present boundaries of SCIDD, water stored behind Coolidge Dam, when constructed, would be used for the irrigation of 50,000 acres within the Gila River Indian Reservation and 50,000 acres within SCIDD.

In 1925, the United States, on behalf of the Indian Community, SCIDD landowners and others, sued upstream water users in the Safford and Duncan-Virden Valleys, along with all other users of water from the Gila River from its confluence with the Salt River up to the Duncan-Virden Valley, ending in New Mexico. The suit, which came to be known as the Globe Equity litigation, sought among other things to establish the prior rights of the Indians of the Gila River Indian Reservation and the newly created SCIP to the use of Gila River water.

The United States District Court for the District of Arizona appointed a Special Master who heard arguments, listened to testimony, and admitted exhibits. After ten years of negotiations, the parties agreed to settle the suit and a consent decree embodying the settlement was drafted. The court entered the stipulation and consent for entry of the Final Decree on June 29, 1935. Under the Decree, the United States, on behalf of the Indians of the Gila River Indian Reservation, is entitled to divert 300,000 acre-feet of water annually from the Gila River. Historically, however, the Indian Community has received, on average, only about 100,000 acre-feet annually of its decreed entitlement, due to insufficient flows in the Gila River at the Reservation's diversion point.

Despite the entry of the Globe Equity Decree, disputes persisted over the interpretation of certain of its provisions, particularly those concerning the calculation of the upper valley diverters' annual entitlements under the Decree. Additionally, as technology for pumping from wells became more readily available, withdrawals of groundwater in the upper valleys increased. The legality of these uses were not expressly addressed in the Decree; nevertheless, the effect of increased groundwater pumping in the upper valleys was to lessen the flow of the Gila River, thereby decreasing the amounts of water available for use by the Community and SCIDD landowners downstream.

At the time of the entry of the Decree in 1935, the Indian Community's interests were represented in the Globe Equity proceeding by the United States. A motion to intervene submitted by the Indian Community just prior to the entry of the Decree was denied by the district court, and this denial was never appealed. In 1982, the United States District Court entered an Order permitting the Indian Community to intervene as party to the Globe Equity Decree for the purpose of enforcing the Decree against the upper valley users. The court declined to permit the Community to reopen the issues resolved by the Decree. This decision was recently echoed by the Maricopa County Superior Court in the Gila River Adjudication. The adjudication court held that the Globe Equity Decree was res judicata as to the Indian Community's claims to additional Gila River water which might have been asserted and decided by the court in 1935; the Community accordingly was precluded from

asserting these claims to additional Gila River water in the adjudication. This decision, along with the earlier decision of the Globe Equity Decree court, enhanced the importance of the Community's enforcement suit as a vehicle for addressing its long-standing grievances with water users in the upper Gila valley.

The Globe Equity enforcement litigation, commenced by the Indian Community in 1982, remains ongoing. The court has issued numerous decisions interpreting provisions of the Decree; however, the Community's challenge to the legality of ground-water pumping by the upper Gila valley users has not yet been decided.

While most of the lands within the Gila River Indian Reservation are within the Gila River watershed, a small portion of the Reservation lies within the Salt River watershed, west of the Phoenix metropolitan area. Many of these lands were added to the Reservation in 1879. At that time, a group of Indians, commonly referred to as the Maricopa Colony, was living there. Since some time prior to 1900, these Indians diverted water from the Salt River for the irrigation of approximately 1,000 acres.

In 1901, the federal government, acting on behalf of the Maricopa Indians, brought suit in Arizona territorial court to stop nearby non-Indian irrigators from interfering with the waters of the Salt River used by the Indians. Some of the defendants named in the suit later became shareholders of the Association, after its incorporation in 1903. On June 11, 1903, Judge Kent issued the decree in *United States v. Haggard*, which adjudicated the Maricopa Indians' right to irrigate approximately 1,080 acres of land with water from the Salt River. In 1917, the Haggard Decree was incorporated into the Benson-Allison Decree, which also adjudicated water rights for lands not included in the original Haggard Decree, located near the confluence of the Salt and Gila Rivers.

Other than the approximately 1,080 acres irrigated by the Maricopa Colony, and included in the Haggard and Benson-Allison Decrees, no lands on the Gila River Indian Reservation have ever been directly irrigated using Salt River water. Despite this fact, in the mid-1980s, the Indian Community asserted a claim in the pending Gila River Adjudication to approximately 1.8 million acre-feet of water annually from the Salt and Verde Rivers, as well as the Gila River. More recently, the Indian Community amended its claims and now asserts the right to more than 2.7 million acre-feet of water annually from the Gila River, its tributaries and groundwater. These claims, which far exceed the combined annual flow of all of these rivers, are based on the federal reservation of rights doctrine and largely encompass potential future uses of water by the Indian Community on its Reservation.

Thus far in the Adjudication, the Indian Community's attempts to prosecute its enlarged claims to the Salt River have not met with success. The Superior Court in the adjudication recently concluded that the Indian Community and the United States are estopped by a decision of the United States Court of Claims, entered decades ago, from asserting any claim to the Salt River other than for the 1,490 acres within the Maricopa Colony. The Community has appealed this decision of the Superior Court, as well as its earlier decision precluding the Community's assertion of additional claims to the Gila River. At this time, the Arizona Supreme Court has not decided whether to hear the Community's appeal. In the absence of the Settlement that is presently before the Congress, the continued prosecution of these appeals by the Community could delay the ultimate determination of its water right claims by a court for some time. In the interim, the uncertainty associated with the potential magnitude of the Community's rights to water from the Salt and Verde Rivers continues to threaten existing water uses.

In order to alleviate this uncertainty and assure the dependability of water supplies to the more than 3 million residents of Maricopa, Yavapai and Pinal Counties in central Arizona, local parties initiated water settlement negotiations with the Indian Community and the United States in 1989. Fourteen years later, the Indian Community, the United States and local interests have reached a comprehensive settlement of the Community's water rights claims, which is embodied in the Settlement Agreement and legislation presently before the Congress.

COMPONENTS OF THE GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT AGREEMENT

I. Parties.

The Settlement Agreement is entered into among: the United States of America; the Gila River Indian Community; the State of Arizona; the Salt River Project Agricultural Improvement and Power District; the Salt River Valley Water Users' Association; the Roosevelt Irrigation District; the Arizona Water Company; the Arizona cities of Casa Grande, Chandler, Coolidge, Glendale, Goodyear, Mesa, Peoria, Phoenix, Safford, Scottsdale and Tempe; the Arizona towns of Duncan, Florence, Gilbert,

Kearny and Mammoth; the Franklin Irrigation District; the Gila Valley Irrigation District; the Maricopa-Stanfield Irrigation & Drainage District; the Central Arizona Irrigation and Drainage District; the San Carlos Irrigation and Drainage District; the Hohokam Irrigation and Drainage District; the Arlington Canal Company; the Buckeye Irrigation Company; the Buckeye Water Conservation and Drainage District; Central Arizona Water Conservation District; Phelps Dodge Corporation; and the Arizona Game and Fish Commission.

II. Annual Water Entitlement and Components.

A. Average Annual Entitlement. Under the Settlement Agreement, the Indian Community shall be entitled to an average of 653,500 acre-feet of water annually. This includes, among other things, the Community's existing decreed rights under the Globe Equity, Benson-Allison and Haggard Decrees, plus substantial amounts of groundwater pumped from beneath the Reservation. The average shall be calculated over a consecutive ten-year period, reckoned in continuing progressive series, beginning on January 1 of the year after the date that the Settlement Agreement becomes enforceable.

B. Components of Entitlement. The Indian Community's average annual entitlement shall be satisfied from the following sources, subject to their availability in any given year, as specified in the pertinent provisions of the Settlement Agreement.

1. Globe Equity Decree Water. As part of the Settlement, the United States and the Indian Community have agreed not to claim any rights to the waters of the Gila River except those decreed to them as specified in Articles 5 and 6 of the Globe Equity Decree. The United States and the Indian Community shall have the right to enforce the provisions of the Decree against other water users, including water users that are not parties to the original Decree. However, the Indian Community has agreed to limit its enforcement rights under the Decree, by refraining from bringing enforcement proceedings against existing users in the Upper Gila and San Pedro River watersheds. See Section II.B.10 below.
2. Haggard Decree Water. The Settlement recognizes the right of the United States, the Community, its members and allottees under the Haggard Decree, as modified by the Benson-Allison Decree, to 540 miners inches of water from the Salt River. The Settlement also confirms that such rights shall be deemed fully satisfied by SRP's performance of its water delivery obligations under the Contract between the United States and the Salt River Valley Water Users' Association dated May 5, 1936, as amended. This Contract, commonly referred to as the Maricopa Contract, provides that SRP shall make available 5,900 acre-feet of water per year for diversion and use on Reservation lands with rights under the Haggard Decree, as modified by the Benson-Allison Decree.
3. SRP Stored Water. Resolving the additional claims of the Indian Community to water from the Salt River, the Settlement entitles the Indian Community to an annual amount of water from the Salt River Project ("SRP"), ranging from 0 to 35,000 acre-feet, depending upon storage levels in SRP reservoirs on May 1 of each year. The annual variation in the amount of the Community's water entitlement is based on a program of shared surpluses and shortages, agreed to as a guiding principle by the parties during their negotiations. The Community's stored water entitlement will be transported to the Reservation via SRP's water delivery system, subject to certain delivery system capacity limitations specified in the Agreement. Water that is credited to the Community on May 1 of each year, but is not used by April 30 of the following year, may be carried over in storage for the Community's subsequent use, up to a maximum amount, specified in the Agreement, which may not be exceeded at any time. Moreover, in any single year, the Community will not be entitled to order more than 45,000 acre-feet total from the current year's entitlement and the Community's entitlement to "carry over" water from prior years. The Community shall pay for the delivery of SRP stored water at 100 percent of the cost per acre-foot of stored water for SRP shareholders. The Community's entitlement to SRP stored water will be phased in over a period of five-years, commencing in the year that the Settlement becomes enforceable.

4. Roosevelt Water Conservation District Surface Water. The Indian Community has reached a separate settlement of its water disputes with the Roosevelt Water Conservation District ("RWCD"), under which the Community is entitled to 4,500 acre-feet of water annually from RWCD. The agreement also provides for the relinquishment of RWCD's allocation of Central Arizona Project water to the United States for the benefit of the Community, also referred to in Section II.B.5 below. The Gila River adjudication court's approval of the Indian Community's settlement agreement with RWCD is proceeding independent of this Settlement.
5. CAP Water. The Settlement entitles the Indian Community to a total of 328,500 acre-feet annually of water, from the Central Arizona Project ("CAP"), subject to the availability of the water and the priorities of the respective allocations comprising the Community's entitlement. In addition to the Community's original CAP entitlement, multiple entities with contractual rights to water from the Central Arizona Project ("CAP") have agreed to assign their CAP allocations to the Indian Community, as a vehicle for settling the Community's objections to appropriative rights also held by these entities. The individual components of the Community's entitlement to CAP water are: (a) the Community's original CAP Indian Priority Water allocation (173,100 acre-feet); (b) Roosevelt Water Conservation District CAP Water (18,600 acre-feet); (c) Harquahala Valley Irrigation District CAP Water (17,800 acre-feet); (d) Asarco CAP Water (17,000 acre-feet) if an agreement is reached between Asarco and the Community; and (e) new CAP non-Indian Agricultural Priority Water (102,000 acre-feet). The Indian Community may lease or exchange all or a portion of its CAP entitlement, but none of its entitlement may be permanently transferred, nor may the Community lease, exchange, forbear or otherwise transfer its CAP entitlement for use outside the State of Arizona.

Subject to certain monthly and annual volume limitations, SRP has agreed to take delivery of CAP water to which the Community is entitled for use by SRP shareholders, in exchange for the storage of the same amount of Salt and Verde River water in SRP reservoirs for eventual use by the Community. This exchange is subject to the ability of SRP to divert and beneficially use the CAP water to which the Community is entitled. SRP will deliver exchange water ordered by the Community via the SRP water delivery system only after determining that the system capacity is not needed to fulfill water delivery obligations of SRP that predate the Settlement.

SRP also has agreed to accept delivery of CAP water to which the Community is entitled for direct delivery to the Reservation, via SRP's water delivery system. The direct delivery of this water to the Community also will be subject to the limits of SRP's water delivery system capacity, as discussed in the previous paragraph.

6. Reclaimed Water from the Cities of Chandler and Mesa. The Indian Community shall be entitled to receive 40,600 acre-feet annually of reclaimed water, made available to it by the cities of Chandler and Mesa. In exchange, the Indian Community shall cause the delivery to these cities of 32,500 acre-feet of the Community's CAP Indian Priority water. In addition to the exchange of reclaimed water for CAP water, the City of Chandler shall deliver reclaimed water to the Community in the amount of 4,500 acre-feet annually.
7. Underground Water. The Indian Community also shall be permitted to pump underground water from wells on the Reservation to the extent needed to satisfy its annual water entitlement to 653,500 acre-feet. The Settlement Agreement additionally calls for the state legislature's creation of underground water "protection zones" on the south side of the Reservation, in Pinal County. Underground water pumping by non-Indians from these zones will be limited to specific per-acre amounts set forth in the Settlement Agreement. Pumping by non-Indian water users that exceeds these amounts must be replenished by the State or other persons as specified in the Agreement.
8. Blue Ridge Water. Phelps Dodge Corporation has offered to transfer to SRP its right, title and interest in Blue Ridge Reservoir, including all rights to water developed by operation of the reservoir. If SRP ac-

cepts Phelps Dodge's offer, and the transfer of water rights to SRP is accomplished under Arizona law, then SRP will provide to the Community a portion of the water stored behind Blue Ridge Reservoir, ranging from zero to 836 acre-feet annually, depending on reservoir storage levels in Blue Ridge on May 1 of each year. Water that is credited to the Community on May 1 of each year, but is not used by the end of April 30 of the next year, will not be available for the Community's use in subsequent years. If SRP accepts Phelps Dodge's offer and obtains the right to water stored in Blue Ridge, there also may be an opportunity for municipalities in water scarce areas of Gila County, Arizona, to enter into agreements with SRP for the use of some of this water.

9. SRP Drain Water. The Settlement permits the continued use by the Community of water discharged into certain drain ditches by SRP, and provides for the contribution by SRP of \$500,000 toward the cost of easements, construction, rehabilitation, operation and maintenance of these drain ditches on the Reservation.
10. Diversions by Upper Gila Valley and San Pedro River Water Users. As part of the Settlement, the Indian Community will enter into agreements with municipalities in the upper Gila valley and San Pedro River watershed, resolving objections by the Community to these municipalities' water uses. Agreements with Safford, Duncan, Kearny and Mammoth are attached as exhibits to the Settlement Agreement. Additionally, the Community will enter into a comprehensive agreement with multiple irrigation districts and other water users in the upper Gila valley, which resolves long-held grievances by the Community's with respect to the effects of diversions by these users, who are parties to the Globe Equity Decree, on the Community's downstream water rights.

In addition to the resolution of disputes between the Indian Community and upper valley users with water rights under the Globe Equity Decree, the Settlement also creates a legal framework for resolution of present and future disputes between the Community and upstream water users who do not hold decreed rights. The Settling Parties have agreed to the establishment, by state legislation, of the Upper Gila Watershed Maintenance Program, whose purpose is to limit ground-water pumping in the Upper Gila River watershed and San Pedro River watershed. After the program is established, as long as its provisions are enforced, the Settlement's "Safe Harbor" provisions, described in detail in the Agreement and exhibits, will shield existing water diversions from the upper Gila valley and San Pedro River watersheds from legal challenge by the Community. In general, the Safe Harbor provisions allow the continuation of existing diversions of water for irrigation, municipal and industrial, and domestic purposes within the upper Gila River watershed and the San Pedro River watershed. These Safe Harbor provisions also permit the initiation of new domestic and large industrial uses in these areas, under terms and conditions specified in the Settlement.

III. Waiver and Release of Claims.

In exchange for the benefits provided under the Settlement Agreement, the Indian Community, its members and allottees, and the United States on their behalf, shall execute a comprehensive waiver and release of claims for water rights, injuries to water rights and injuries to water quality, among others, as provided in the exhibits to the Settlement Agreement. The other settling parties also shall execute waivers and releases of claims that such parties may have against the Community, its members or allottees, and the United States on their behalf, as specified in the Agreement.

IV. Community Fund.

- A. Federal Funds. The Settlement, when confirmed and implemented by an enactment of the United States Congress, will provide the Community with funding for the following purposes:
 1. Rehabilitation of existing facilities and construction of extensions to those facilities—\$147 million.
 2. Defrayal of operation, maintenance and replacement costs associated with the delivery of the Community's CAP water—\$53 million.

3. Rehabilitation of subsidence damages to lands within the Gila River Indian Reservation occurring before the date the Settlement Agreement becomes enforceable—\$4 million.
4. Implementation of a water quality monitoring program—\$3.4 million.
- B. State Contribution. The Settlement also calls for the State of Arizona to “firm” the delivery of 15,000 acre-feet of the Community’s new entitlement to CAP non-Indian agricultural priority water to the equivalent of municipal and industrial CAP water delivery priority for 100 years.

V. Congressional and Court Approval.

Before it can be enforceable, the Agreement must, among other things, be confirmed by the United States Congress and approved by the courts in the Gila River Adjudication and Globe Equity proceedings.

VI. Benefits to the State of Arizona Resulting From the Settlement.

A. Greatly increased certainty of the priority and quantity of relative rights to the Salt, Verde, Gila and San Pedro Rivers, and of CAP allocations will benefit all of Arizona in future planning.

B. The waiver of claims to be executed by the Indian Community and the United States under the Settlement Agreement is comprehensive. Specifically, the Community will agree not to assert claims to water in excess of the quantities provided in the Agreement as to all water users in Central Arizona, including individuals and small entities without the resources to defend themselves in litigation. The Community will also agree not to object to the water right claims of all other users in Central Arizona, with the exception of a small number of users whose asserted water rights, if upheld, would impair the exercise of the Community’s water rights under the Settlement Agreement. The Community is continuing its efforts to reach a settlement of its disputes with these users.

C. The resolution of disputed issues related to the allocation of CAP water as part of the Congressional legislation approving the Settlement frees up that water for future Indian settlements.

D. Additional water is made available to the valley cities and towns under the Settlement, through leases or exchanges of water with the Indian Community.

E. State agencies, including the Arizona Department of Water Resources and the Arizona Game and Fish Commission would save money that would otherwise be spent in litigation of the Indian Community’s claims, as well as the Community’s objections to the claims of these state agencies.

F. This settlement will permit the Community, the United States on its behalf and the Community’s neighboring non-Indian water users to put behind them contentious and divisive litigation concerning the Community’s water rights and to move forward together in planning for the continued prosperous development of Arizona.

**Statement submitted for the record by The Honorable Van Talley, Mayor,
City of Safford, Arizona**

Chairman Calvert and Members of the Subcommittee:

Thank you for the opportunity to submit testimony on H.R. 885—Arizona Water Settlements Act. The City of Safford respectfully submits written testimony supporting the Gila River Indian Community Water Rights Settlement authorized in H.R. 885. On behalf of the residents of Safford, Arizona, and customers of the City water system I express gratitude for your interest in our water problems.

Located along the bank of the Gila River upstream from the Gila River Indian Reservation, Safford is a growing city serving water to more than 20,000 people, including the Town of Thatcher and other neighboring communities in Graham County. As Southeast Arizona’s commercial center, Safford, like other municipal, industrial and agricultural sectors, requires reasonable and reliable water supplies. The Gila River Indian Community Water Rights Settlement offers this security among the parties.

For decades, Safford has continued to work with water users in the Upper Gila River Valley, the United States, and Native American tribes and communities to resolve water quantity and water quality issues. For the past five years, the City, along with other parties, diligently worked to settle the Gila River Indian Community’s water rights claims. The bill before you is the culmination of efforts resolving the Community’s claims, which in turn saves the parties from uncertain, complex, and expensive litigation concerning water rights.

Like many other parties, one of the benefits Safford receives is certainty of water supplies and the ability to plan for the future accordingly. The Community and cer-

tain other parties confirm Safford's water rights that would otherwise be contested and litigated. The Settlement recognizes Safford's right to use 9,740 acre-feet of water per year and provides mechanisms to enable the City to meet higher demands. While Safford's water allocation is relatively small when compared to the Community's 653,500 acre-feet, it nonetheless assures Safford of water for present and reasonably foreseeable needs.

The Settlement also helps to enhance Gila River water quality while simultaneously providing Safford with a water source to meet additional demands. The Settlement authorizes the appropriation of funds to repay indebtedness on the City's recently constructed state-of-the-art water treatment facility. Treated water may be returned to the stream to enhance stream flows and stream quality, or recharged to meet Safford's future water demands. The use of treated water is just one of the methods that Safford may implement to meet future needs without diminishing available water for other users and parties to the Settlement. To obtain these benefits, Safford agreed to a water budget of about one half of its claimed water rights.

The treatment plant and a dependable water supply for the benefit of Safford are just a few of the positive results that are being proposed in the Settlement. Dozens of cities and towns receive similar benefits. Agricultural and industrial interests may continue to operate with less litigation risk towards their water supplies. The Settlement also enhances and preserves land, wildlife, and the environment.

The Settlement with the Gila River Indian Community and H.R. 885 is a giant step in resolving the pending issues and confirming water rights among the parties to a limited supply of water. I urge the House to pass this bill that will settle significant water rights in the State of Arizona and allow the Gila River Indian Community and many cities, towns, irrigation districts and others to plan for future growth with confidence and reliable water supplies.

The following information submitted for the record was too lengthy to print and has been retained in the Committee's official files:

- Burdette, Vivian, Chairwoman, Tonto Apache Tribe, Statement submitted for the record in support of H.R. 885
- Fullmer, Jamie, Chairman, Yavapai-Apache Nation, Statement submitted for the record in support of H.R. 885
- Spokane Tribe of Indians: A Showing of the United States' Need to Fairly and Honorably Settle the Tribes Claims for Grand Coulee—A Narrative with Attachments, submitted for the record on H.R. 1753

[A supplemental statement on H.R. 885 submitted for the record by Herbert R. Guenther, Director, Arizona Department of Water Resources, follows:]

ARIZONA DEPARTMENT OF WATER RESOURCES

500 North Third Street, Phoenix, Arizona 85004

Telephone 602 417-2410

Fax 602 417-2415

October 14, 2003



Janet Napolitano
Governor

Herbert R. Guenther
Director

Oct 29 2003

The Honorable Ken Calvert
Chairman
Subcommittee on Water and Power
House Resources Committee
Washington, D.C. 20505

Dear Chairman Calvert:

Thank you for the opportunity to appear before the Subcommittee on Water and Power to present the State of Arizona's testimony on H.R. 885, the Arizona Water Settlement Act.

The Subcommittee left the hearing record open to witnesses to supplement testimony. The Central Arizona Water Conservation District (who submitted separate testimony) and the Arizona Department Water Resources prepared supplemental information in response to the written and oral testimony of the San Carlos Apache Tribe about H.R. 885. The Cities of Phoenix, Chandler, Glendale, Goodyear, Mesa, Peoria, and Scottsdale; the Maricopa Stanfield Irrigation and Drainage District, and the Central Arizona Irrigation and Drainage District have reviewed this supplemental response and those entities support the submittal of the supplemental response.

I respectfully ask that my responses to questions and the supplemental response be made a part of the official hearing record. Again, I thank you for the opportunity to represent the State of Arizona before the Subcommittee.

Sincerely,

A handwritten signature in cursive script, reading "Herbert R. Guenther".

Herbert R. Guenther
Director

C: Hon. Grace Napolitano
Hon. J.D. Hayworth
Hon. Rick Renzi

Enclosures

Arizona: October 14, 2003

Arizona Supplemental Testimony in Response to San Carlos Apache Tribe Written Testimony

The written testimony submitted by the San Carlos Apache Tribe regarding S. 437 and H.R. 885 contained errors and misstatements, the most notable of which are set forth below (in italics) followed by a correct statement of the facts.

"The San Carlos Apache Tribe was intentionally and systematically excluded from the drafting of this Settlement, and from participating in the negotiations of the settlement agreements which have occurred over the last several years." (Statement of Kathleen W. Kitcheyan, page 3)

Fact: The San Carlos Apache Tribe was not excluded from the negotiation or drafting of the Arizona Water Settlements Act or the Gila River Indian Community Water Rights Settlement Agreement. To the contrary, the Tribe was repeatedly invited to participate, but chose not to.

"Section 106(b) of the proposed legislation would relieve CAWCD of \$73,561,337 in capital debt to the United States for the CAP." (p. 6)

Fact: The legislation does not relieve CAWCD of any CAP repayment debt. The debt relieved in section 106(b) is debt owed by non-Indian irrigation districts for construction of their CAP distribution systems. That debt is being relieved to compensate the non-Indian irrigators for relinquishing their long-term CAP water rights to make that CAP water available to settle the water rights claims of Indian tribes such as the San Carlos Apache Tribe. As part of the relinquishment, CAWCD will pay \$85 million of the irrigators' debt in addition to its CAP repayment debt.

"The proposed legislation permits CAWCD to continue discriminatory pricing of Indian CAP water, and to keep all of the power and other revenues to subsidize non-Indian use of CAP water to the lowest rates, thus making Indian use of CAP water virtually impossible." (p. 8)

Fact: The legislation does not address the pricing of CAP water. By law and contract, CAWCD operates the CAP and sets rates for water delivery to non-Indian water users and for federal uses. The Secretary of the Interior (Secretary) then decides what delivery rate Indian tribes will pay; if the rate charged Indian tribes is less than the federal use rate established by CAWCD, then the Secretary is responsible for paying the difference. The CAP delivery rate established by CAWCD for federal uses is the same as that for non-Indian CAP subcontractors and is tied to the actual cost of delivering water. As part of the Arizona Water Settlement Agreement, to which the United States is a party, CAWCD has promised to deliver to non-Indian farmers a limited quantity of CAP water for a limited time at less than the full cost of delivering that water. The non-Indian irrigators will receive low-cost pricing in return for permanently relinquishing their long-term rights to CAP water so that water can be reallocated to Indian tribes such as the San Carlos Apaches to facilitate Indian water rights settlements. The water to be delivered to those

farmers is “excess” CAP water—that is, water that is not ordered by those with long-term CAP contract entitlements. CAWCD’s taxpayers will pay the remainder of the cost of delivering excess water to the non-Indian farmers. Indian tribes such as the San Carlos Apaches do not pay taxes to CAWCD. Power revenues are not used to subsidize CAP rates for non-Indian water users. Far from making Indian use of CAP water “impossible,” the Act will instead allow the use of Development Fund revenues to pay a substantial portion of the cost of delivering CAP water to Indian tribes, leaving the tribes to pay the same effective rate as non-Indian irrigators and far less than CAP municipal and industrial water users.

“The proposed allocation of CAP water in the Arizona Water Settlements Act increases the size of the Indian and M&I water categories, which in turn, increases the uncertainty of the entire pool of Indian and non-Indian CAP water pools.” (p. 10)

Fact: The Act does not increase the amount of Indian and M&I priority water; all CAP water reallocated under the Act will retain its existing priority. [See, e.g., section 104(a)(3)] The Act will not “increase uncertainty,” but rather will improve the reliability of the San Carlos Apache Tribe’s CAP water in at least two respects. First, the Act enhances the reliability of the Tribe’s M&I priority water by reducing the ability to convert lower priority non-Indian agricultural water to M&I priority, thereby diluting the M&I pool. Second, the new shortage sharing criteria in the Gila River Indian Community water rights settlement agreement will elevate the priority of the Tribe’s “Indian irrigation” water to be the same as its “Tribal homeland” water.

“The proposed legislation prescribes an entirely new system for use of the [Development] Fund which greatly assists CAWCD in its repayment obligation for the non-Indian portion of construction costs of the CAP (which will be reduced to \$1.65 billion in the proposed legislation), assists in payment of OM&R expenses for non-Indians, and relegates, except for the benefits of GRIC, the Indian portion of construction costs, the funds for construction of Indian CAP projects, and payment of Indian OM&R to the leftover scraps, if any.” (p. 11)

Fact: Under existing law and contract, Development Fund revenues are applied each year against CAWCD’s repayment obligation. The Act does not alter that arrangement in any respect and provides no additional “assistance” to CAWCD. Nor does the Act reduce CAWCD’s repayment obligation for the CAP, which was established in a stipulated settlement of litigation in U.S. District Court between CAWCD and the United States. The Development Fund does not pay any OM&R expenses for CAP water delivered under contract with non-Indian CAP water users, either currently or under the Act. Indeed, the first priority use of Development Fund revenues under the Act is to pay the fixed OM&R costs of delivering CAP water to Indian tribes, such as the San Carlos Apache Tribe. No Indian tribe has ever been asked to repay one cent of the cost of constructing the CAP. By comparison, non-Indian water users, through CAWCD, have repaid the federal government nearly \$700 million thus far. The Act does not alter the provisions of the Basin Project Act that authorize appropriations for the construction of CAP

distribution systems for Indian tribes. The State of Arizona and CAWCD have supported appropriations necessary for the construction of those systems and will continue to do so. Far from relegating tribes to the “leftover scraps,” the Act supplements traditional methods of funding the construction of Indian distribution systems by authorizing use of Development Fund revenues, in addition to appropriations, for that purpose.

“The proposed legislation would tie the development of infrastructure to deliver a Tribe’s CAP water entitlement, obtained in the 1980 contract, to a final settlement of the Tribe’s water rights.” (p. 15)

Fact: The Act would allow the use of Development Fund revenues to fund construction of CAP distribution systems for tribes that have Congressionally approved water rights settlements, such as the San Carlos Apache Tribe, as well as other specific tribes without settlements, such as the Yavapai-Apache. The Act does not preclude Congress from making appropriations to fund construction of CAP distribution systems for tribes that do not have final Indian water rights settlements.

“The new shortage sharing criteria creates a structure whereby Indians will be required to take a greater reduction in their CAP supplies than required by the current Indian CAP contracts and non-Indians will bear less of the burden for the shortage than under the current non-Indian M&I contracts.” (p. 16)

Fact: The shortage sharing criteria in the Gila River Indian Community water rights settlement agreement reconciles incompatible provisions in the CAP Indian contracts, CAP non-Indian subcontracts and the Secretary of the Interior’s 1983 Record of Decision regarding the allocation of CAP water. It does so in a manner that is fair and equitable to all CAP water users. The new shortage sharing criteria will not apply to any CAP Indian tribe, including the San Carlos Apache Tribe, unless that tribe agrees to be bound by them.

“Under Title II of the proposed legislation, when the CAP canal capacity is not enough to deliver all CAP Water Orders, GRIC will be the last required to take a reduction.” (p. 17)

Fact: There is no such provision in Title 2 (or elsewhere in the Act). If canal capacity is limited, the Gila River Indian Community is entitled to receive no greater percentage of its annual water order in any month than any other similarly situated CAP water user.

“The proposed legislation would eliminate the Secretary of Interior’s discretion of determining when a shortage exists and the discretion of determining many of the terms of CAP delivery contracts.” (p. 17)

Fact: The Act will not affect the Secretary’s discretion in determining whether a shortage exists on the Colorado River or in implementing CAP delivery contracts.